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HINDU JURISPRUDENCE—A STUDY.

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The next branch of Hindu law that I shall deal with is the law of property. The Hindu law not merely recognises ownership but recognises it as appertaining to three different classes of persons or entities : (1) the village community ; (2) the family ; (3) the individual. The trend of opinion among recent law-givers and modern commentators is to recognise individual ownership. It is absurd to think, as some European critics seem to do, that the Codes do not recognise property as a legal conception.[1] In the *Mitakshara*, in discussing the question whether property is temporal or is the result of sacred texts, reliance is placed on the existence of a notion of property among the inhabitants of barbarous countries.[2] It is needless to state that such a notion must be an ancient one among the civilised Aryans of our law-givers.

Before we proceed to discuss some of these titles by which properties are acquired, it may be useful to state that according to the Hindu law the notion that all property belongs to the king is not correct. Manu says:[3] " Sages who know the past call this earth (Prithivi), even the wife of Prithu; they declare a field to belong to him who cleared away the timber, and a deer to him who first wounded it." It is objected that Manu in this, as in other passages, is giving only an ideal description and that his theory is not supported by any other law-giver. This is, however, not correct, and we find ample support for the correctness of his view among other writers. It would appear from the nature of the discussion on the law of gifts that the view that the king was not the owner of the

1. See Markby's Elements of Law, para. 83, p. 50.

2. Mitakshara, Ch. I, S. 1, Pl. 9. "Besides, the use of property is seen also among inhabitants of barbarous countries who are unacquainted with the practice directed in the sacred code, for purchase, sale and similar transactions are remarked among them."

3. Manu, Ch. 9, § 44.

land was the prevailing notion among Hindu writers. Gifts of land are stated to be meritorious according to our sacred books. Various religious merits are stated in the books as attaching to such gifts. In the case of gifts of land by the king, it is said that the religious merit ascribed to a gift of land as such does not attach, as the king, in granting the land, only grants the revenue, he not being the owner of the land. If the king wants the religious merit attaching to a gift of land as such, he must buy the land from the owner and then make the gift. There is also a learned disquisition upon the subject in the sixth Adhyaya, Pada 7, Adhikarana 2 of the Mimamsa [1] and the author of the Vyavaharâ Mayukha [2] quotes it with approval[3].

1. The discussion is with reference to what ought not be given in a *Visvajit* sacrifice. The Sutra is: "The earth is not to be (given in the Visvajit sacrifice) as it is common to all." Upon this what is stated in the Nyayamala is this: "(The great earth should be given or not given) (The objector says) let the King give it by reason of his Swatvam, *i. e.*, by reason of its appertaining to him. The earth, however, does not appertain to him as his kingship means only (or exists for) protection. Hence it should not be given." The commentary upon this is: "If it is said that 'when the king who is the emperor of the whole world gives everything in a Visvajit sacrifice the whole land together with the pasture grounds, highways, water, &c., should be given by him as the earth appertains to him only as his wealth according to the Smriti 'the King is the lord of all excepting Brahmins" we say (the reply is) the meaning of the Smriti is, that the lordship of the king is by reason of the punishment of the wicked and the protection of the good and not that the earth is the king's property. Further this earth is the common wealth of all creatures who have to enjoy or reap the fruits of their own Karma. Hence although there may be a gift of property (Bhumi) which is not common there cannot be a gift of the great earth."

2. Vyavahara Mayuka, S. I, Pl. 8. In conquest also, where the property of the conquered consists in houses, lands, money or the like there alone ownership is acquired by the conqueror, but in the revenue of the conquered, the conqueror possesses the same but no property in them. Even so in the sixth [Book of the Mimamsa]: "The whole earth must not be given away by the King of the world, neither a district by the ruler of that district." But the property in each village, house, or other [portion] of a whole country or a district of it, belongs solely to the owner of the soil (bhumika, &c.). The revenue only belongs to the prince. Therefore in gift, or other alienation of such lands as are here made mention of, a gift of the land is not brought about; we must only suppose a mere livelihood granted. But in purchase from the owner of the soil, even ownership accrues there, whether houses, land or other property. Then, indeed, the benefits of a gift of land also may be obtained from it." *Vyavahara Mayukha*, Ch. IV, S. I, Pl. 8. S. Sirkar's Translation, p. 64.

3. The commentary of the *Mitakshara* on Yagnavalkya, Ch. II, § 318, should not be regarded as inconsistent with this view. The author seems to say that even the owner of land cannot make a gift so as to claim the merit attaching to a gift of land as he can give land subject to revenue and that the king alone is in a position to do this.

Various modes of title by which property may be acquired are known to Hindu law. The famous text of Gautama, which has been the subject of much discussion among Sanskrit writers as to the nature of property acquired by a woman by inheritance to a male or female, is the leading authority[1]. "An owner is by inheritance, purchase, partition, seizure or finding. Acceptance is for a Brahmin an additional mode of acquisition. Conquest for a Kshatriya. Gain for a Vaisya or Sudra." This text is referred to by various commentators.

The comment on this text in the Mitakshara is[2]: "Unobstructed heritage (apratibhanda daya) is here denominated 'inheritance' (*riktha*). Purchase is well-known. Partition (*samvibhaga*) intends heritage subject to obstruction. (*Sapratibhanda daya*). Occupation or seizure (*pratigraha*) is the appropriation of water, grass, wood and the like not previously appertaining to any other (person or owner). Finding (*adhigama*) is the discovery of a hidden treasure or the like."

It may be noted that omitting the first three titles (*Riktha*, *Kraya*, and *Samvibhaga*) there are five modes by which property may be acquired by a person. The first deals with seizure or occupation (*pratigraha*) corresponding to the title of *occupation* under the Roman law. This presupposes as the commentary also indicates that the property appropriated does not belong to any other. A thing may not belong to any other, either because there is no owner or because the previous owner has abandoned it. Where a person thus abandons possession with the intention of abandoning ownership there is, according to Roman law, a *derelictio* which is the opposite of occupation. The Mitakshara gives us instances of occupation and objects of occupation such as water, grass, wood and the like. A more familiar object is wild animals and the Viramitrodaya adds[3] "appertaining to common tracts such as forests." The distinction between wild

1. Gautama, Ch. X § 39, to 42. S. B. E., Vol. II, p. 231.

2. Mitakshara, Ch. I, S. I, Pl. 13. Colebrooke's Translation, p. 10.

3. Viramitrodaya, Ch. I, S. I, page 280. Mitakshara on Inheritance, p. 10. The Sarasvati Vilasa explains seizure to be [S. 466], the appropriation of water, grass, firewood and other things found in a forest and other places, which have not been appropriated by other persons. Rev. Foulkes's Translation, p. 94. See also Smriti Chandrika (Ch. I, Ss. 26 and 27, pp. 11 and 12). The explanation of Hara Datta, the commentator on Gautama Smriti, is this:—"Partition, *i.e.*, the division (of the estate) between brothers and other (co-parceners); seizure, *i.e.*, the appropriation before (others) of forest trees and other things which have no owner; finding *i.e.*, the appropriation of lost property the owner of which is unknown, such as treasure trove."

animals and domesticated animals is familiar to Hindu lawyers. In the case of a wild animal he who first shoots or wounds is the owner as stated by Manu in the verse already quoted[1]. The person who subsequently shoots it with out the permission of the first hunter does not acquire property. Thus Narada says[2]: "Who ever after the death of the owner or of another man sprung from the same race who has succeeded to his property he may repair the dyke after having been authorised to do so by the king. By acting otherwise he will get into trouble in the same way as the hunter of the tale. The shafts of him are spent in vain who hits again and again one who has been hit already."

According to Manu[1] a person who first tills the soil will be the owner of the soil. This necessarily pre-supposes that the property so occupied was previously without an owner. A familiar example of *derelictio* in the Hindu law is that of a bull whose owner abandons it for the gods. Of course the abandonment makes the bull a derelict and when the abandonment is in favour of a temple the bull cannot be regarded *as res nullius.*

The distinction between derelict property and lost property is well known to Hindu lawyers. In the case of lost property there is no abandonment of ownership and the finder is therefore bound to return the property to the true owner and commits an offence if he sells it clandestinely. This is clear from several passages both in Manu and other codes[3]. In fact Manu directs that a certain portion of the value of a lost article should be paid to the king on its recovery[4]. When the owner himself finds the article lost he need not pay anything but he must inform the king of it[5]. The subject is apparently dealt with by Hindu lawgivers under the heading of "finding." The law of treasure trove is also dealt with under this heading. The rules as to treasure-trove are to be found in Manu[6].

As regards property which is still the subject of a person's ownership it is by the act of the parties concerned that this

1. *See* Manu, Ch. XI, § 21 and 22. S. B. E., Vol. XXV, p. 434.
2. Ch. XI § 21 and 22. S. B. E., Vol. XXXIII, p. 159.
3. *See* Manu, Ch. VIII, §. 33 to 36. S. B. E., Vol. XXV, pp. 258 and 259.
4. *See* Manu, Ch. VIII § 39 to 46. S. B. E., Vol. XXV, p. 260.
5. Narada, VII. §. 7. S. B. E., Vol. XXXIII, p. 146.
6. Do. Ch. VIII § 37 to 39. S. B. E., Vol. XXV, p. 259.

ownership may be transferred or a title acquired by somebody else. The modes recognised by the Hindu law by which such title may be acquired are purchase, gift, release and the like. As regards purchase the author of the Mitakshara states that it is well known. There are two kinds of property recognised by the Hindu law, movable and immovable. Such property whether movable or immovable is again divisible into two classes *viz.*, that which can be the subject of sale and that which cannot be so[1]. "A familiar instance of property which cannot be sold is that which is dedicated to gods or, as it is termed in Roman law *res sacra*". The rules as regards purchase, the rescission thereof and the non-delivery of the properties sold are stated in detail by the Hindu law-givers.[2]

Gift, according to the Mitakshara, consists in the relinquishment of one's own rights and the creation of the right in another, and the creation of another man's rights is completed on that other's acceptance of the gift but not otherwise[3].

According to the English law although in theory there must be offer and acceptance, property is said to vest in the donee even before acceptance as it is said that acceptance must be presumed in such cases so that if the donee refuses to accept the property already vested in him, it is said to be divested. But according to the Hindu law, at any rate of the Mitakshara, no property in the subject-matter of gift is vested in the donee until acceptance. Such acceptance comprises three acts, first the mental act, secondly the verbal, and thirdly the corporeal. Upon this the Mitakshra says[4]: "Acceptance is made by three means: mental, verbal and corporeal; mental acceptance is the determination to appropriate; verbal acceptance is the utterance of the expression, 'this is mine' or the like, which is a concrete certainty; corporeal acceptance is manifest as by touching." Special injunctions have been issued as to this mode of acceptance. "Let him give the skin of an antelope by holding its tail, a cow in the same manner, an elephant by his foreleg, a horse by his mane, and a slave girl by her hand." Aswalayana

1. Narada, Chap. VIII, § 2. S. B. E., Vol. XXXIII, p. 146.

2. Narada, VIII and IX. S. B. E., Vol. XXXIII, pp. 147 and 149.

3. Mitakshara, section 6 on title without possession, Pl. 2, and William Macnaughten, Vol. I, p. 217.

4. William Macnaughten, Vol. I, pp. 217 and 218.

has also said: "Let him verbally address rational beings and touch creatures, not having the faculty of reason and female slaves".

The same principle is enunciated in the Viramitrodaya[1]. "The gift being an act whereof the effect is the generation of another's right, the term "gift" implies the act of inference etc., (by the donor) in favour of the acceptance of the donee, but the production of that effect is not possible without the acceptance by the donee; hence the act of the donee completes the gift, but that alone does not constitute the gift. The act of the donee, however, is the *sine qua non* of gift for without it gift cannot be accomplished". The acceptance must be public according to Yagnavalkya[2]; a gift is therefore incomplete without acceptance. In fact in the Dana Mayuka of Nilakhanta, Dana or gift is defined as consisting of both the relinquishment and the acceptance. "Paraswathum oothpathyanthah dravyathyaha danam," *i. e.*, Danam or gift is the cause of creating property in another after relinquishment by the owner.

The Hindu law also recognises a title called "accessio" in Roman law. If another plants a tree or sows in my land the tree and products belong to me as the owner of the land. So where a person builds a house on my land without my consent the person building the house is not entitled to the house. According to Narada he will not be entitled under certain circumstances to remove the house so that the house will become the property of the owner of the land. If, however, the house is built with the consent of the owner of the land who gives his consent on condition of the builder paying rent the builder may be entitled to remove the house on quitting the land.[3].

When a river has by slow and imperceptible degrees changed its course and enlarged a piece of land in a perceptible manner,

1. Viramitrodaya, Ch. I, Sec. 50, p. 298.

2. Yagnawalkya, Ch. II, § 176.

3. Narada, § 20 and 21. S. B. E., Vol. XXXIII, p., 143, 144. "If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks, and other (building) materials."

"But if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall by no means take with him, on leaving it, the thatch and the timber."

Cf. Mitakshara, § 156 (Vyavahara) :—

"The construction of bridges for the welfare of the public, wells, etc., which generally occupy a small space, but which are useful to the public by giving a large supply of water should not be prevented if causing little injury (to the owner of the soil)."

viz., by carrying away a large portion of the land higher up the river and adding it to another, then as soon as the addition is firmly attached to that other land there is an accession to such land and the accession becomes the property of the owner of the land to which it becomes the accession according to the Roman law. It is a principle of universal application not peculiar to any particular system of municipal law that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano or the field covered by the sea or by a river, the ground, the site, the property remains in the original owner[1]. Land cut off by a river belongs to the owner of the estate of which it was a part, so also where land is submerged and is afterwards reformed in the same site and such land is capable of identification, the owner of the land, *i. e.*, the original owner is entitled to it. But if it is not capable of identification the owner of the estate adjacent to such reformation will be entitled to it as an accretion. Similar principles apply where there is accretion by gradual, slow and imperceptible means. It is, however, not intended to discuss here the law of alluvion and diluvion which is now part of the system of law administered by the British Indian courts. Suffice it to say that the general principles underlying such law is to be found in our law books [2].

1. *Felix Lopez* v.*Mudden Mohun Thakoor & others*(1870) 13 M.I.A.467, 473

2. (*a*) Narada, Chapter XI § 6. S.B.E., Vol. XXXIII p. 156. "When a piece of ground has been carried off by a stream, or abandoned (by the owner), or when the boundary marks have been destroyed, they shall fix the boundary) according to the inference to be drawn from (on inspecting) the spot, and according to the traces of possession (held) by the former owner."

(*b*) See also Brihaspati, Ch. XIX, § 16 to 21. S. B. E., Vol. XXXII, pp. 353—354 given below :—

16. "Supposing a piece of land to have been taken from a village belonging to one man, and given to another man, either by a large river or by the king, what should be decided in that case?"

17. "The land abandoned by a river or granted by the king belongs to him who receives it. Otherwise, there would be no acquisition through fate or the king among men."

18. "Loss and gain and life among men depend upon the act of fate and of the king: therefore, in all affairs, what is effected by them must not be rescinded."

19. "When a river has been fixed as the boundary line between two villages it shall never be removed on account of loss or gain arising from (that river to either village). He who removes it, is liable to punishment.

20. "The encroachment (of a river) on one side produces an increase of land elsewhere in banks of rivers; that (increase) must not be taken from him (who gets it)."

Of course no property can be acquired out of an offence. Thus there can be no property in a thing which has been the subject of robbery in the sense that no property can be acquired by a robber or by any person claiming title under him. This is clear from what is stated by the author of the Mitakshara:[1] "It should not be allowed that even what is obtained by robbery and other nefarious means would be property. For proprietary right in such instances is not recognised by the world and it disagrees with received practice." But although no property can be acquired by robbery, and possession without title can also confer no proprietary right so that the persons who enjoy without a title for ever so many years will be liable to be punished as thieves[2](a) still possessory title as such is known to the Hindu law[3]. It is heritable, and where it has been so held for three generations a title is acquired[4].

Where a suit for ejectment is pending and the defendant dies the defendant's son cannot rely simply on possession but must prove his title in the same way as the original defendant, his father, would have been bound to show title and cannot rely upon possession merely[5]. The property of women and kings is excepted

21. "When land is carried away by the swift course of a river overflowing a tilled piece of ground, the previous owner shall recover it."

(c) *Vivadachintamani,* translated by Prosanna Coomar Tagore, p. 123.

"Who shall get the land left by the river?

A river increases on one side and decreases on the other. This cannot be helped.

The land, forsaken by a river owing to its taking a different course, falls to the share of him who is the owner of the land adjacent to the bank. When a land is divided into two or more parts by the violent course of a river, it shall belong to the former owner."

(d) Colebrooke, Vol. I, p. 445. Note on verse 43, of Parasara last para.

1. Mitakshara, Ch. I, S. I, Plac. II.

2. Narada, 1 § 86, 87. S. B. E., Vol. XXXIII, p. 62.

3. Mitakshara, Chapter on Possession. Sec. 3, Plac. 3. Macnaughten, page 201.

Also Mitakshara—Title, Possession without a title, Sec. 5 Plac. 1 & 4, Macnaughten, p. 212.

4. Narada I § 88. S. B. E., Vol. XXXIII, p. 62.

5. Narada I § 91. S. B. E., Vol. XXXIII, p. 63. Brihaspati IX, 26 to 30. pp. 313, 314.

from the rule of prescription[1]. Thus Narada states:[2] "The property of women and of kings can never be lost even though it be enjoyed for hundred years by strangers who have no title to it."

According to the Hindu law twenty years' possession creates a prescriptive right.[3] The text of Gautama already referred to does not enumerate possession as one ground of the acquisition of title. The explanation of the author of the Mitakshara is that this text of Gautama is merely perceptive, *viz.*: "It merely enjoins the duties of the several tribes and furnishes no proof that the modes of acquiring property are to be ascertained solely by reference to scriptural authority."[4] This rule of prescription only applied to the cases of open possession, whereas the rule in Narada relating to many "hundred years" and "three ancestors or generations" applied to concealed possession. Our law-givers recognised the rule of presumption that possession is proof of title[5].

Coming to the other question, namely, as to the persons who can own property, there are traces in the law books of properties being owned by village communities. Certain privileges are

1. Yagnavalkya Vyavaharadhyaya §. 29. Mitakshara (Title) 'Title without Possession,' Sec. 6, Plac. 9 & 10, Macnaughten pp. 221, 222; also Narada I. § 93, S. B. E., Vol. XXXIII, p. 64.

2. Narada I, § 81, 82, 83. S. B. E., Vol. XXXIII, p. 62.

Mitakshara (Title) 'Effect of Possession' Ch. III, S. 3. Plac. 13. Macnaughten, p. 207. *See* Brihaspati IX, § 13 & 14. S. B. E., Vol. XXXIII, p. 311. Compare as regards property held in trust Brihaspati IX. § 11, 12 pp. 310, 311.

See also Manu, Ch. VIII, p. 149 and Narada I, § 82. S. B. E., Vol. XXXIII, p. 62.

3. *See* Yagnavalkya Vyavaharadhyaya, § 24. Brihaspati, however, fixes a period of 30 years—IX, § 7. S. B. E. Vol. XXXIII, p. 310.

Narada, however, refers in verse 82 only to pledges and the rest, and in verses 87 and 88 holds that enjoyment without a title for ever so long a period does not create prescriptive title; that, however, is not the sense of Yagnavalkya's text but the author of the Mitakshara apparently tries to reconcile the texts of Narada and of Yagnavalkya by stating that the text of Yagnavalkya refers to produce of the land of the property so held and not to the property itself.

4. *See* also Mitakshara (Title) 'Effect of Possession' Ch. III *Sec.* 3 Plac. 3 and also Note to p. 202. Macnaughten's Mitakshara. (Title-Possession without a Title).

5. Ch. III, S. 5, Plac. 1 & 4 Title without Possession, Macnaughten 212, 213

,, 6. Plac. I, Ibid 217. ... ...

,, 9. Plac. 1 & 7, Ibid p. 217 & 221 ... ...

Brihaspati, IX § 29 to 31, Vol. XXXIII S. B. E. p. 314.

given to villagers as such by Manu. Yagnavalkya, in Chap. II, verse 187, states : "He who appropriates the property of a community and he who transgresses its usage shall be made to forfeit all his property and be banished from the kingdom." The commentary in the Mitakshara on the term "property of a community" (ganadravya) is "that wealth which is the common property of all the collective body of people of a village, and the like." So it is you will find in almost all the law books that the king is directed to recognise the laws of guilds, corporations, assemblies, etc.[1].

Long prior to the time when the Mitakshara came to be written we find the theory of family property giving way to the comparatively modern theory of individual property. The joint family was apparently showing signs of decay and the disintegrating forces at work gave rise to individual ownership. To this state of things the author of the Mitakshara had to address himself. The recognition of a right by birth in the sons is the first step in disintegrating the family. Again, with the usual skill of our commentators, he started with the leading text of Yagnavalkya[2] which gave the succession to the wife and the rest and proceeded to explain away the contradictory passages in which the wife's right was not recognised. It must, however, be observed that search as we may the books of our law-givers, we shall not be able to find anything in them to support the rule of survivorship made applicable to joint families by decisions of the Judicial Committee [3] and other Indian decisions. The author of the Mitakshara first deals with the rights of sons and declares that they have rights by birth in their fathers' or grandfathers' property. He nowhere mentions the right of survivorship which is now settled to be the main characteristic of a Mitakshara co-parcenary. If it be said that in the first chapter the author deals only with self-acquired or separate property, then we are necessarily driven to the conclusion that the author of the Mitakshara nowhere deals with co-parcenary property and with sons' rights in co-parcenary property. Apart from this the references to fathers' and grandfathers' property and the

1. Manu, Ch. VIII. § 219 to 221. S. B. E., Vol. XXV, p. 293.
2. Yagnavalkya's Vyavaharadhyaya, § 135 & 136.
3. *Appoovier's case* (1866) 11 M. I. A. 75.

affirmance of sons' rights in such property immediately on their birth will show that the author is dealing with both self-acquired and co-parcenary property [1].

The rule of Yagnavalkya affirming the right of the wife and the rest[2] clearly applies to any kind of property held by the deceased owner whether it be the self-acquired or separate property of the person or his share in co-parcenary property. The rule as to re-united persons mentioned by Yagnavalkya[3] is only a rule of preference in the law of succession. The author of the Mitakshara takes it as an exclusive rule or as an exception to the rule as to the wife[4]. This cannot be correct as the same verse refers to another rule which is clearly a rule of preference[5], *i. e.*, the rule as to whole blood, though, to suit his previous explanation, the author of the Mitakshara takes the whole brother to be the re-united brother. Some of the conflicting texts cited by the author of the Mitakshara denying the right of the wife affirm that the husband's property is taken by the father or brothers. The author of the Mitakshara, in holding that these texts had no reference to a person who held separate property who died divided, went as far as he could at that stage of development of the law but could not be said to have affirmed positively that the rule of Yagnavalkya had no application to any other case. He could not have said so as the rule itself was general.

Left to itself the next stage in the development of the Hindu law would be the literal enforcement of the rule of Yagnavalkya according to its natural construction, or at least the affirmance of the right of the wife, daughter and daughter's son to succeed to all kinds of property in preference to all except perhaps the father and the brother with reference to joint property. But the absence of a systematized commentary in later times, due perhaps to the disturbing influence of frequent Muhammadan invasions and, the intervention of British lawyers steeped in English

1. Mitakshara, Ch. I, S. 1. Plac. 21, 24. Colebrooke's Trans. pp. 14 and 15 and Ch. I, S. 5, Plac. 2, 9, 10 & 11. Colebrooke's Trans. pp. 32 and 35.

2. *See* Vyavahara Adhyaya § 135, 36.

3. Yagnavalkya II § 139.

4. Mitakshara, Ch. II, S. 9, Plac. 1. Colebrooke's Trans. p. 103.

5. Here it may be useful to note that the construction which we have suggested of the text of Yagnavalkya is exactly the same as that made by Apararka in his Commentary on Yagnavalkya Smriti, 21 M. L. J. pp. 366, 367.

notions, of administering law which led to the stereotyping of our Hindu law, arrested this growth. In fact the author of the Sarasvati Vilasa seems to suggest this very principle in Placitum 482 and Brihaspati expressly affirms that the wife will be entitled to take all property whether divided or undivided of her husband.[1] "Here it is said : 'The right of taking his heritage belongs to the wives of an undivided man'; *i.e.*, though their husband's gnatis may be alive the right of taking his share belongs to his wives alone, though he is an undivided man, just as in the case of a divided man, by an extension of the rule, because by the absence of his brothers there is an establishment of speciality over the heritage of all of them by the termination of that of each of them in succession[2]." The more correct rendering is this: "Though their husband's gnatis may be alive, in the absence of his (husband's) uterine brothers as there is an establishment of a restriction over or in respect of the heritage of all of them even in the state of non-division (*i.e.*, even when they are undivided) by the termination of them severally, the right of taking his share belongs to the wife alone by the extension of the rule as regards a divided man." There is no text in any Smriti excluding the wife in a case when a husband died leaving no father nor brother but other coparceners.[4] However, we must be thankful to the Judicial Committee for the small mercy granted to us when they laid down that whatever be the status of the family, property held by a member separately is governed by the rule of succession contained in the *Mitakshara*. The so-called right of survivorship can at best be only a rule of succession even in respect of property held in coparcenary.

1. S. B. E., Vol. XXXIII, p. 377. "Although kinsmen (sakulyas), although his father and mother, although uterine brothers be living, the wife of him who dies without leaving male issue shall succeed to his share."

But see also Brihaspati, § 53 & 54 S. B. E., Vol. XXXIII, p. 378 which must be regarded as later interpolations.

53. "The husband being separated (in interest from his former co-parceners) his wife shall take after his death a pledge and whatever else is recognised as property, excepting the immoveable wealth.

54. A wife though preserving her character and though partitions have been made is unworthy to obtain immoveable property. Food or a portion of the arable land shall be given to her at will (for her support.)

2. Saraswati vilasa p. 482, Foulkes, p. 97.

3. *Katama Nachiar* v. *Rajah of Shivagunga* : (1863) 9 M.I.A, 539 ; and *Chowdhry Chintaman singh* v. *Mussamul Nowlukho Konwari* (1875) 2 I. A. 263.

While it is so doubtful whether the rule laid down in Yagnavalkya as regards the succession of the wife and the rest is restricted and has no general application and whether there is any such thing as a right of survivorship in the case of joint undivided property; there can be no doubt that in the case of reunion our authors never intended the peculiar rule of survivorship to apply, at any rate in its entirety. It is a matter for extreme regret that notwithstanding an express order of succession relating to a reunited family prescribed both in the Smritis[1] and in the commentaries[2] our courts should not have given effect to the same.[3] By this the widow is denied the rights which even those commentators who are not by any means favourably disposed towards females recognise.

Before proceeding to the next subject I may state here the position of women with respect to property. I have already said that it is not correct to say that our law-givers in any way countenanced the theory that women should be in a state of dependence. Again, the texts declaring that women were dependent mean only that they were confined almost to the house and did not mix with males and had no occupation except the discharge of their duties in the household when protected by others.[5] In fact the texts refer

1. See Manu IX, § p. 210-212; Yagnavalkya II, § 138 & 139.

2. See Mitakshara II, 9 pl. 4-13. Colebrooke's Translation pp. 103-105. Madhaviya §,47. Burnell p. 34 to 37 Vardarajah Burnell pp. 52 to 56. Smritichandrika XII, pl. 21 to 26. Krishnasamy Aiyar's Translation pp. 215 to 216. Vivada Chintamani p. 308; Viramitrodaya, Sarkar's translation's Ch.VII pl. 4-8 p. 300. Vyavahara Mayuka IV. 89, pl. 5-13. Borrodailes' Translation pp. 85 to 88.

3. See *Narasimhacharlu* v. *Singaramma*: 19 M. L. J. 719, s.c. I. L. R. 35 M. 165. *Kristraya* v. *Venkatramayya* : 19 M. L. J. 723.

4. Yagnavalkya, Ch. 2, § 48.

"Women also who are independent, such as milkwomen and wives of virtuous may institute judicial proceedings." Macnaughten, Vol. I, Ch. IV, S. 1, § 15, p. 228.

"A debt contracted by the wife of a herdsman, distiller of spirits, public dancer, washer or hunter, shall be discharged by the husband (because he is supported by his wife)." Vishnu, Ch. IV, § 37, S. B. E., Vol. II, p. 45.

A debt contracted by the wife shall never bind the husband, unless it had been contracted at a time when the husband was in distress. Household expenses are indispensably necessary." Narada, I, § 18. S. B. E., Vol. XXXIII, p. 47.

"The wives of washermen, huntsmen, cowherds and distillers of spirituous liquors are exempt from this rule. The income of these men depend upon their wives, and the household expenses have also to be defrayed by the wives. Narada, I, § 19. S. B. E, Vol. XXXIII, p. 47. The text of Narada, 1, § 34 S. B. E. Vol. XXXIII p. 51 and 5 § 41 S. B. E. Vol. XXXIII p. 138 only show that the want of independence is in relation to the disposal of property while the first text merely states the position occupied by the respective members of the household in respect of society. Compare Brihaspati 24 § 4. S. B. E. Vol. XXXIII p. 368.

to the wives of traders, artisans, etc., who had occupations of their own and declared that such women were independent.[1] Gautama and other writers explain the want of independence as relating to the performance of rites and ceremonies. "A wife is not independent with reference to the fulfilment of the sacred law."[2] This view also receives support from the texts which show the veneration with which certain women are and ought to be regarded and the concern displayed by our law-givers to inculcate respect and regard for wives and women generally.[3] Be this as it may, there can be no doubt that our sages showed practical sympathy for our women and advanced their position in a practical manner. As I have already said, women can hold property in their own right according to the Hindu law. Manv of them have

1. "But the debts of the wives of washermen, fowlers, milkmen and wine vendors, shall be paid by their husbands. For the latter depend entirely on and their families are supported by, the former. This rule holds good where the women manage families and the men are simple and without any distinction of caste." Vivadachintamani translated by Prasanna Comar Tagore, p. 40.

2. Gautama, Ch. XVIII § 1. S.B.E. Vol. II, p. 270.

3. Usanas Ch. I, § 30 to 37 Dutt's Translation pp. 192, 193.

30. Of all elderly persons, five are to be particularly [adored], *viz.*, the father, the mother, the spiritual guide, the teacher and the priest: of them the first three are the foremost; and of them a mother is to be particularly adored.

31. One who gives habitation even for a day, one who gives instruction even for a moment, the eldest brother and the protector [or the husband in case of a woman] are the five Gurus (elderly persons worthy of respect).

32. These five should be adored by one, seeking one's own well being, with one's best personal exertion or even with the renouncement of one's own life.

33. With disinterestedness and renouncing all, a son should, devotedly, serve them both, so long as the father and the mother live.

34. The father and the mother being pleased with their son's accomplishments, the son, by this deed, attains to [the fruition of] all [his] works.

35. There is no deity equal to the mother; there is no guru (elder) equal to the the father; there exists no return of their good offices.

36 & 37. One should—by deeds, thoughts and words-do unto them what they like. Without being commanded by them, one should perform any religious rite, excluding those which yield emancipation and the daily and obligatory rites. [To serve the parents] is laid down as the cream of religions, yielding delightful fruits in the next world.

See also Usanas, Ch. III, § 31 to 33, Dutt p. 206.

31. The mother's sister, maternal uncle's wife, mother-in-law, father's sister, and the wives of all the elders, should be adored alike unto the preceptor's wife.

32. The wife of an elder brother, those of kinsmen and relations, mother's sisters and father's sisters and elder sisters, should be saluted by touching the feet.

33. One should treat them all like his mother, but the latter is superior to them all.

Atri. Ch. I § 149 Dutt p. 304 :--There is no *sastra* superior to the *veda*; there is no elderly person superior to the mother; and there is no friend superior to

not merely rights of inheritance but some of them such as the mother, wife, sisters, daughters, etc., aie entitled, according to our law-givers to certain shares where a partition is made even in res-

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charity both in this would and in the next. But what is given to an unworthy person, consumes the family up to the seventh generation.

See also Yagnavalkya Ch. I, § 81, 82 Dutt p. 15.

81. Remembering the vow of women, being faithfully devoted to one's own wife, and being influenced by desire proportionate to (hers), one can know [his wife], (even at any other time except the menstrual period), for it is laid down in the smritis that women should be protected by every means. Yagnavalkya.

82. Women should [always] be adored by the husband, brother, father, kinsman, mother-in-law, father-in-law, hushand's younger brother and the other relatives with ornaments, clothes and food.

See also Manu, Ch. III § 55 to 59 and 60 to 62.

55. Married women must be honored by their fathers and brethren, by their husbands, and by the brethren of their husbands, if they seek abundant prosperity.

56. Where females are honored, there the deities are pleased; but where they are dishonored, there all religious acts become fruitless.

57. Where female relations are made miserable, the family of him who makes them so, very soon wholly perishes; but where they are not unhappy, the family always increases.

58. On whatever houses the women of a family, not being duly honored, pronounces an imprecation, those houses, with all that belong to them, utterly perish, as if destroyed by a sacrifice for the death of an enemy.

59. Let those women, therefore, be continually supplied with ornaments, apparel and food, at festivals and at jubilees, by men desirous of wealth.

60. In whatever family the husband is contented with his wife, and the wife with her husband, in that house will fortune be assuredly permanent.

61. Certainly if the wife be not elegantly attired, she will not exhilarate her husband; and if her lord want hilarity, offspring will not be produced.

62. A wife being gaily adorned, her whole house is embellished; but, if she be destitute of ornaments, all will be deprived of decoration.

See also Apastamba Prasna I Patala IV K. 14, § 6 and 9. S. B. E. Vol. II p. 51.

6. Towards a mother-grand-mother and great-grand-mother) and a father (grand-father and great-grand-father) the same obedience must be shewn as towards a teacher.

9. The feet of (elder) brothers and sisters must be embraced, according to the order of their seniority.

See also Vishnu Ch. 31, § 1 to 10. Dutt p. 887 and S. B. E. Vol. 7, pp. 128, 129.

1 & 2. (One's) mother, father, and preceptor are called one's great gurus (venerable elders).

3. One must perpetually serve them.

4. Let him do their commands.

5. Let him do what is pleasant and beneficial to them.

6. Without their leave he shall not do anything.

7. These (one's parents and preceptor) are the three vedas, these are the three regions, these are the three fires, these are the three gods Brahma, Vishnu and Siva.

pect of joint property.[1] Again, in the case of a partition if the mother and the other females can claim shares from the sons, it cannot be said that they have no such right as against the brothers, etc., of the husband. The courts in this presidency have held, and it seems now to be settled[2] that the rule as to shares of females is not applicable in this Presidency, and it is immaterial to consider whether this was owing to Hindu society in Southern India not being ripe for the development indicated in the law books or to the inadvertence or ignorance of those who were then concerned with the administration of justice in British Indian courts. The Mitakshara which holds very advanced views on many subjects, including rights of women, made no distinction between the nature of property inherited by males and that by females. But our early English lawyers who were more familiar with the principles prevailing in the Dayabhaga School introduced the limitations and restrictions prevailing in that school in respect of estates taken by widows and others.[3]

As according to the highest judicial authority it is not permissible for a judge to enquire whether a particular doctrine is deducible from the earliest authoriies, and all that one should do is to see whether it has been received in the particular school he has to deal with, the discussion as to the wife's right of succession and as to shares of females will be purely academical. But such a discussion, however, will be important when any legislation attempts to deal with these questions.

There is one principle definitely settled in the Hindu law of property, *viz.*, that property once vested cannot be divested. There are various instances as to the application of this principle.

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8 The father is the (garhapatya) household fire, the mother is the ceremonial (dakshina) fire, and the preceptor is the sacrificial (ahavaniya) fire.

9. Futile are the acts of him, by whom these three are dishonoured.

10. Devotion to mother conquers this world, devotion to father conquers heaven, and devotion to preceptor conquers the region of Brahma.

See also Vishnu Ch. 32 § 2, 3 & 7. Dutt p. 888 and S.B.E. Vol. 7 pp. 129 & 130.

2. Likewise the wives of those of their same caste.

3. Likewise the mother's sister, the father's sister, the elder sister.

7. Even a stranger's wife shall be addressed as mother, sister, or daughter.

1. Mayne's Hindu Law, Paragraph 477.

2. Do. p. 478.

3. Do. Paragraph 609 and also 3 M. H. C. 312 and Mayne do. 798.

The principle is not peculiar to the Hindu law but is one of universal application. It was sought to be applied recently in English courts in the case of the deceased wife's sister whose marriage with her deceased sister's husband has been declared by a recent Act of Parliament to be legal.[1]

I now turn to the question of courts and procedure. As regards courts we start with the well-worn theory that the king is the fountain of justice and so he is at the head of the court administering justice with the aid of learned men versed in the law. The conception of sovereignty and the theory of punishment laid down in Manu's Code are so singularly advanced and so juristic as to justify the statement that Austin has been anticipated ages ago by our sages. In the absence of the king or even in his presence there is the Chief Justice. There are several gradations of courts mentioned in our law books.[2] These are (1) persons specially appointed by the Ruler; (2) Puga or assembly of townsmen ; (3) Sreni or companies of traders ; (4) family.

Manu's description of a court of justice is to be found in Chapter VIII.[3] Here again it is said that Manu gives only an ideal description of what ought to be and not an actual description of what existed at the time. Apart from the fact that courts are referred to in Yajnavalkya and in more detail by Narada and Brihaspathi, two of the most recent and advanced of the Smriti writers, we have an elaborate procedure set out, as will be shown presently, by our Smriti writers and commentators which will not be the case if there is only an ideal description of courts in the codes. There was no reason to forge an elaborate procedure, and that in detail, if there had been no courts in actual practice. Further, if it is true that dramas are written portraying the actual state of society at the period to which the scene relates, we have in the "Toy-cart" (Mrichhakatika) a whole scene portraying a trial in a Hindu law court as it existed at the time.

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1. Hill v. Mathie (1911) 1 Ch. 310.

2. See Macnaughten Vol. I, p. 223 and see also Narada Introduction I, § 6 and 7 S. B. E. Vol. 33, pp. 6 and 7.

3. § 44 to 46. S.B.E. Vol. XXV p. 261.

The King's Court had an equal and concurrent jurisdiction with other courts and a suitor might file his suit in the king's court without proceeding to the lower court and it was also the final court of appeal.[1] The king, as supreme ruler, was alone entitled to decide knotty law cases, and he was enjoined to appoint competent persons as members of his court.[2] As, according to our sages, one-quarter of the iniquity committed falls upon the assesors of the court these are enjoined to divest themselves from both love and hatred and deliver a fair opinion.[3] Yajnavalkya mentions[4] that the King in his court should be "divested of anger and avarice." The author of the Mitakshara comments upon this as follows :[5] "Conformity to the sacred codes having been already enjoined this injunction seems to be superfluous *but it is used to show the paramount necessity of such conduct* 'Anger': impatience of temper, 'Avarice' excessive desire of gain." When the paramount necessity of the King being impartial, etc., is insisted upon by our law-givers it is needless to declare that the same qualifications are insisted upon in the case of judges or assessors of the court.[6] Yajnavalkya says[7]: "Persons who

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1. See Mitakshara, Ch. IV, S. 1, Pl. 4, 5 and 6. Mac., Vol. I, pp. 224, 225.; Brihaspati I, § 31. S.B.E., Vol. XXXIII, p. 282.

2. Narada, Introduction III, § 4 and 5. S.B.E., Vol. XXXIII, pp. 36 and 37.

4. "Let the king appoint as members of a court of justice, honorable men, of tried integrity, who are able to bear, like good bulls, the burden of the administration of justice."

5. "The members of a royal court of justice must be acquainted with the sacred law and with rules of prudence, noble, veracious and impartial towards friend and foe." See also Yagnavalkya, Ch. II, § 2, and Mitakshara Ch. I, S. 1, Pl. 9 and 10. Mac., Vol. I, p. 135.

3. Narada, Introduction III, § 12 and 15, S. B. E. Vol. 33, pp. 38 and 39.

12. "One-quarter of the iniquity goes to the offender; one-quarter goes to the witness; one quarter goes to all the members of the court, one quarter goes to the king."

15. "Therefore let every assessor of the court deliver a fair opinion after having entered the court, discarding love and hatred, in order that he may not go to hell."

4. Yagnavalkya, Ch. II, § 1. Mitakshara, Ch. I, S. 1, Pl. 2. Macnaughten, Vol. I, p. 133.

5. Mitakshara, Ch. I, S. 1, Pl. 8. Macnaughten, Vol. I, p. 135.

6. Mitakshara, Ch. I, S. 1, Pl. 5. Macnaughten, Vol. I, p. 134.

7. Yagnavalkya, Ch. II, § 2. Mitakshara, Ch. I, S. 1, Pl. 9. Macnaughten, Vol. I, p. 135.

are versed in literature acquainted with the law, addicted to truth and impartial towards friend and foe, should be appointed assessors of the Court by the King."[1] The commentary of the author of the Mitakshara on "impartial towards friend and foe" is "divested of enmity, affection, partiality, prejudice and the like." In the case of judges receiving bribes the law prescribes confiscation of their property besides retrial of their decisions.[2]

The court is enjoined to give its judgment upon equitable grounds also.[3] It must conform to the law or custom.[4] These are sources upon which the judgment must be based. Equity based upon reasoning is also one of such sources. Thus Narada states: "The only firm friend which follows you even after death is justice; everything else is extinct with the body.[5] When law suits are justly decided, the judges obtain their own absolution. Their innocence depends on the justice of the decisions; therefore should *equitable judgments* only be pronounced."[6] Again, later on; he states: "That is not a judicial assembly where the elders are missing nor are they elders who do not pronounce a just opinion nor is that a just opinion which is against equity nor is that equitable which is contaminated with fraud."[7]

Our European critics, speaking of the Smriti writers, say that the conception of truth inculcated in the codes is radically below the mark, and most of our European judges and others often make sweeping remarks as to the perjury stated by them to be prevailing among the Indian witnesses generally and ascribe it to the low ideal supposed by them to be held out in our

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1. Mitakshara, Ch. I, S. 1, Pl. 10. Macnaughten, Vol. I, p. 135.

2. Vishnu, Ch. V, § 180. S. B. E., Vol. VII, p. 39.

3. Brihaspati, Ch. I, § 24. S. B. E., Vol. XXXIII, p. 280.

4. See Yagnavalkya, Ch. II, § 5. Mitakshara, Ch. V, S. 2, Pl. 1. Macnaughten, Vol. I, p. 141. See also Mitakshara, Ch. I, S. 1, Pl. 25. Macnaughten, Vol. I, p. 140.

5. Jolly's Translation of Narada, Ch. II, § 10 and 11, p. 13.

6. See Narada, III Introduction § 7, S. B. E. Vol. XXXIII, p. 37. "When law suits are decided properly, the members of the court are cleared from guilt. Their purity depends on the justice (of the sentences passed by them). Therefore one must deliver a fair judgment."

7. Narada, Introduction III, S. B. E., Vol. XXXIII. p. 40. 'That is not a judicial assembly where there are no elders. They are not elders who do not pass a just sentence. That is not a just sentence in which there is no truth. That is not truth which is vitiated by error."

books. It is a question whether it can be true as a matter of fact whether perjury prevails to any greater extent here than it does among the witnesses in European countries. In every country the same motives will contribute to make a witness speak falsehood, and it cannot be that those motives are greater in India than in other countries. But be this as it may, it is absolutely incorrect to say that the sages do not inculcate anything but absolute truth as an ideal. In Manu's Code there may be some passages which at first sight seem to suggest that it is permissible to speak falsehood.[1] But it must be remembered that Manu's Code is not merely a Code of Law but also a Code for the actions of persons in life. In saying that falsehood is spoken in certain cases he is merely stating what usually happens as a fact and cannot be supposed to mean that he permits the speaking of falsehood in those cases. He is not dealing with witnesses who have to speak in a court of justice. With reference to these it has been the concern of our law-givers to emphasise that they should speak the absolute truth. Whatever may appeal to a witness, whether it can be a feeling of supernatural fear or fear in this world by way of punishment or otherwise has been appealed to.[2] The concern shewn by our law-givers to have "justice" administered to parties absolutely contradicts the theory that something less than absolute truth is inculcated.[3] This is not all. The passages in Narada show completely that what is insisted upon is the absolute truth, the whole truth and nothing but the truth. What nobler praise can be bestowed upon truth than the following : [4] " S. 210. Truth

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1. Manu, Chapter VIII, § 103, 104 and 112. S. B. E., Vol. XXV, p. 272. Brihaspati, Chapter VII, § 35. S. B. E., Vol. XXXIII, p. 303. Apparently the author has the object of minimising the motives for falsehood and does not state them with any intention of preferring falsehood to truth. That is apparent from Manu, Chapter VIII, § 3. S. B. E., Vol. XXV, p. 273 and by the direction that the judgment based on false evidence shall be reversed. Manu, Chapter VII, § 117. S. B. E., Vol. XXV, p. 274.

2. Narada, Ch. IV, § 1, 10. S.B.E., Vol. XXXIII, pp. 244 to 246. Brihaspati, Ch. VII, § 19 to 22, S.B.E., Vol. XXXIII, p. 301. Manu, Ch. VIII, pp. 81 to 83, 89, 90, 93, 94, 95 to 100, 119 to 122. S.B.E., Vol. XXV, pp. 269 to 272, 274.

3. Narada, Ch. III, § 3 to 18. S. B. E., Vol. XXXIII, pp. 36 to 40.

4. Apasthamba Prasna II, Pat. II, Kh. 29, § 7 to 10 S. B. E., Vol. II, pp. 170, 171.

Gautama, Ch. IX. § 68 and Ch. XIII § 31. S. B. E., Vol. II, pp. 226 and 249.

is said to be the one unequalled means of purification of the soul. S. 211. Truth weighs more heavily than a thousand horse sacrifices. S. 214. Truth is the greatest gift, truth is the most efficacious kind of austerity, truth is the highest duty in the world, thus it has been revealed to us. S. 226. There is no higher virtue than veracity, nor heavier crime than falsehood."

The consequences of falsehood are stated in the following passages : "S. 221. Neither relations, nor friends, nor treasures, be they ever so great, are able to protect those who are about to be plunged into the tremendous darkness (of hell). S. 216. By uttering a falsehood thou wilt precipitate thyself into a most dreadful hellish abode. S. 225. Those places of abode which are destined for the murder of a Brahman and those which await the murderer of a woman or child, and the regions awaiting an ungrateful man are reserved for a false witness."

The happiness and welfare of a people depends largely on the pure administration of justice and the bulwark of the British rule in India mostly depends on it. Our law-givers were fully alive to this principle and with this object insisted upon high qualifications for judges and made them administer justice equally, impartially and fearlessly upon pain of punishment both in this world and the next. Brihaspati says: "Judges passing unjust sentences, those who live by taking bribes and those who disappoint confidence placed in them, all such shall be banished', and Vishnu and other writers add confiscation of property in the case of bribe-taking.[1] In fact, an iniquitous judge, a false witness and a murderer of a Brahmin, etc., are treated similarly and are all stigmatised as having committed heinous crimes.[2] This regard for the pure administration of justice by our Hindu sages is quite in keeping with our own times and one is reminded of the speech of the present Lord Chief Justice of England when responding to the toast of His Majesty's Judges in the Lord Mayor's Banquet a few years ago : " Time was when the judges had stood between the Crown and the liberties of the people and protected the people. He hoped that the time would never come

See Also Gautama, Ch. XIII, § 7, 12 to 23. S. B. E., Vol. II, pp. 246, 248.

Narada I, § 201 to 207, 210 to 216, and 216 to 225. S. B. E., Vol. XXXIII, pp. 91, 92 and 93 to 95.

1. Vishnu Ch. V, § 180 S. B. E., Vol. XXXIII, p. 39.

2. Brihaspati Ch. VII, § 21. S. B. E. Vol XXXIII, p. 301.

when it would be considered that the Executive Government was to be its own interpreter of Acts of Parliament. He trusted that His Majesty's Judges would always be regarded as the impartial tribunal to whom was to be given the duty of interpreting Acts of Parliament. The Judges did not court popularity-that was the last thing they ought to do—but there was not one of them who did not rejoice that the Bench was trusted by the Community. Whatever may be the feelings of individuals there was a determination among all His Majesty's Judges to devote the whole of their energies to their judicial work. It was not given to all of them to be a Mansfield, an Eldon, a Cairns or a Jessel; but at least every Judge, from the highest to the lowest, might strive that when he put off his ermine for the last time the public criticism of his life might be: "*He was an upright and fearless Judge.*" These last words are to be engraved in letters of gold and we believe our Indian judges are quite alive to these sentiments and recognise that there is a duty which they owe to their office apart from their own personal conceptions.

It may also be well to quote the opinion of the Lord Chief Justice as to the reasons for this state of things in England: "To what did they attribute the confidence which was felt in the judiciary of this Empire? In his opinion, it was to a large extent owing to the fact that their ranks were recruited from the experienced members of the Bar. He had often spoken with men of other countries of the system under which the judges were trained to their duties without practising at the Bar and he was satisfied that the main reason for the high regard in which the English Bench was held was that it was recruited from men who, in their profession, had learned boldness, impartiality, respect for other people's opinion and freedom of speech." Well may those who are concerned in the making of our judges ponder over these sentiments of the Lord Chief Justice.

(*To be continued.*)— 4517

TRANSLATION

OF

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

Sloka 146. Inheritance to Stridhan.

" He who, after betrothing a damsel to a person, withholds her from him, shall be punished by the King and made to pay the expenses with interest ; but if she dies, he shall take what was given by him for the girl, taking into account the expenditure on both sides." 146.

He who, having given by word of mouth, a maiden to a bridegroom devoid of any fault like impotency etc., takes her away for another and better bridegroom (*i. e.*, does not give), is punishable by the King. To whatever extent of expenditure of money was made by the bridegroom so much should be given with interest to the bridegroom, *i.e.*, should be made to give by the king. Similarly when the girl dies before marriage, the amount given for the purpose of marriage by the bridegroom to the bride's father, after taking into account the waste of wealth on the part of the bride's father and the bridegroom, the balance, the bridegroom shall take.

It has been mentioned that the husband shall take the deceased woman's wealth in particular cases. Now the author says that if a woman's wealth is taken in times of famine, etc., it need not be returned by the husband.

Sloka 147. Husband's liability to repay wife's money.

A husband is not liable to repay to his wife property taken by him during famine, for the performance of religious duty, during illness, or while under duress. 147.

Famine: (*i.e.*) absence of food. *Performance of religious duty*: (*i.e.*) What should be done of necessity, but not optional acts. *Illness*: (*i.e.*) Intense and chronic—for remedying it. *Duress*: Imprisonment by chains, etc. For these reasons, in the absence of one's wealth, these dangers should be averted with (one's) woman's wealth and if there is no wealth to enable one to repay, it need not be returned to her. This is in reference to times of distress, when a loan, etc., is not obtainable.

Slokas 147.

Husband's liability to repay wife's money.

So also **Devala** :—The wealth given to a woman, jewels, sulka and her gains are stridhanam (a woman's peculiar property). Of this property she should herself be the enjoyer. The husband is not competent to take it when he is not in distress.

" When he spends it uselessly for enjoyment, that wealth, should be returned to women with interest. But in averting calamities affecting the son, he can utilize woman's peculiar property."

Expenditure for purposes like gambling, music, etc. is useless expenditure. As to enjoyment,—it is expenditure in women, food and drink, etc. In remedying dangers to one's son, woman's wealth can be utilizd (*i.e.*) can be be taken. This is the meaning.

Katyayana:—" Neither the husband, nor the son, nor the father, nor the brother have power to use or to alienate the legal property of a woman. And if any of them shall consume such property against her own consent he shall be compelled to pay its value *with interest* to her, and shall also pay a fine *to the King*."

" But if he consume it with her assent, after an amicable settlement, he shall pay the principal only, when he has wealth enough to restore it. " Whatever she has put amicably into the hands of her husband afflicted by disease, suffering distress, or sorely pressed by creditors, he should repay that of his own free will."[1]

The wealth that was given by a woman for releasing the husband from illness and other afflictions:—that is to be returned to her out of one's free will.

" Yet more ; if he has taken a second wife, and no longer receives her, he should be made to restore her property even by force though it be given to him out of affection."

" If suitable food, apparel, and habitation cease to be provided for a wife, she may by force take her own property or she may (if he die) take it from his heir.

"This is the law of Likhita, but after receiving *her own property*, she must reside with the family of her husband"

This rule is the opinion of the great Rishi Likhita; or (*i.e.*, in the alternative it may be taken to relate to) wife's property that was given to her by the husband and kept with the son.[2] When the wealth is taken she should live only in the husband's family and not elsewhere.[3]

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1. Colebrooke II. p. 595, S. 475, §. 4-7.
2. Colebrook II. 599 S. 481.
3. Alternative meanings for the word Likhita.

"The wife who is afflicted with disease, who goes to the house of her own kindred without business, who is disposed towards evil deeds, who is shameless, who destroys the effects (of her husband), who takes delight in being faithless to his bed, is held unworthy of the stridhanam (peculiar property). Wealth has been conferred for the purpose of defraying sacrifices and therefore it should be distributed among proper persons devoted to religious duty and not among women, ignorant men or such as neglect their duties." Slokas 146, 147.

"What has been promised to a woman by her husband, as her exclusive property, must be delivered by his sons, when she remains with the family of her husband, or with the family of her father."[2]

The author speaks of supersession :

To a superseded wife must be given an equal present on the second marriage if she had received no stridhanam (*i.e.*, none of the wealth usually given to woman); but if such wealth had been delivered to her, she is mentioned as entitled to a half of it."[3] 149. Sloka, 149. Portion to superseded wife.

Where, when one has a wife living, another is married, she (the existing wife) is the one superseded; she *i. e.*, that woman, is the superseded wife. To her, the wealth given on supersession, *i. e.*, what is given to her after making her a superseded wife by reason of the supersession—that wealth is meant; and that—an equal amount—equal with reference to what?—by the context it is to be understood as equal to that which is given to the woman married presently: and this should be given to her for whom no stridhanam has been given. But to one who has been granted (stridhanam) a moiety of it only should be given, and not an equal sum. The term " moiety" is not used in the sense (प्रविभागवृत्तिः) of an equal division. The meaning is that to one who has already been given stridhanam, so much should be given as will make the whole equal (to that which is given to the new wife).

The author now speaks of the modes of deciding the factum of partition in cases of disputes as to whether a partition took place or not :—

" **When the fact of partition is denied, it should be ascertained by the evidence of kinsmen, relatives,** Sloka, 149. Proof of partition.

1. Colebrook, Vol. II, pp. 592, 602, § 481 and 484.
2. Cf. Colebrooke who says, "but not if she live with the family of her father: Colebrook Vol. II, p. 601 § 483.
3. Cf. Colebrooke, Vol. II, p. 247, § 87.

Sloka, 149. Proof of partition.

documents, separate acceptances of gifts and by houses and lands separately enjoyed." **149**

[Thus the Chapter on Partition.]

On the concealment of partition by saying "there has been no partition of our wealth, *i.e.*," by a denial of partition: [from one's kinsmen, etc.) the factum of partition should be ascertained. So also by things separately enjoyed :—By separately enjoyed houses, lands, etc., proof of the factum of partition should be ascertained. Kinsmen, etc., are witnesses etc., by reason of their witnessing the partition. Mention of houses, lands etc :—By reason of proofs mentioned in other Sastras as evidencing partition.

Narada :—" When co-heirs have made a distribution, the acts of giving and receiving, cattle, grain, houses, land, household establishments, dressing, victuals, religious duties, income and expenses, are to be considered as separate and (conversely) as proof of partition." Divided brothers. but not the undivided, may become witnesses or sureties for each other and may reciprocally give and receive *presents*."

" Those by whom such acts are publicly done with their separate property, let them be considered as divided, even without written evidence."[1]

Brihaspati :—" They who have separate income and expenditure of wealth, and who lend money to each other, and who trade separately, are divided. There is no doubt."

Vanickpadha is trade.

Narada:—"Where several, born of one, have separate religious duties, separate business transactions with separate results of action (gain and loss), do not agree in their actions, give their own shares, sell them or dispose of them otherwise at their pleasure— then they are the masters of their own wealth."

The meaning of this (is)—If brothers without mutual consent engage (themselves) in purposes that can be attained by money and similarly engage themselves in separate income, wealth, expenditure, and other transactions like agriculture, etc., with gain and loss resulting from business (separately) attaching to them hereby and are opposed even in other matters like the communal and village purposes, then they should be taken as divided. Then they can sell and otherwise alienate their share as they please.

Brihaspati :—Whatever share is enjoyed by each, let not that be contested."

1. Cf. Colebrook Vol, II p. 497, S. 387, § 2-4.

And similarly : Sloka 149.

" If he subsequently dispute a distribution, which was made with his own consent, he shall be compelled by the King to abide by his share or be punished if he persist in contention."[1]

Proof of Partition.

अनुबन्ध *Anubanda* :—Persistency in contention.

Katyayana:—" Those brothers who live for ten years with separate religious duties and business should be taken as divided in paternal wealth and brothers whether divided or undivided have equal rights in immoveables, and one of the family is not competent to give or to alienate (his property)."

Co-heirs having wealth divided or undivided have equal rights in immoveables. Among them, a single person does not become competent to gift away or otherwise dispose of (his property).

Thus ends the Chapter on Partition of Wealth in the Commentary of Apararka relating to the Code of Laws made by Yagnavalkya—written by Srimat Aparaditya Deva born of the family of Jimutavahana, the King of Silahara and a descendant of the family of Sri Vidyadhara.

S. SRINIVASA AIYAR.

NOTES OF INDIAN CASES.

Chellammal *v.* Ranganatham Pillai.—I. L. R. 34 M. 277:—We have no doubt that the decision of the learned judges on the question as to the share which an illegitimate son takes in competition with the legitimate son among Sudras is correct. The learned judges refer to the conflict among English Text writers. Mr. Mayne no doubt says, as mentioned by the learned judges, that the illegitimate son's share is one-half of what it would be if he were legitimate. The learned judges, however, do not refer to the foot-note by the same author in the same page, where he refers to the other view. As observed in an article in 13 *M.L.J.*, p. 67, the doubt as regards this matter of illegitimate son's share is due more to the dubious translation of the text of Mitakshara by Colebrooke than to any conflict among the Sanskrit writers. The text of the Mitakshara is clear. The correct translation of the same is this : " Let them, *i.e.* the

1. Colebrook. Vol. II, § 378, p. 486

sons of the wedded wife, allow the son of the female slave half of their (*i.e.* each of the legitimate son's) allotment. After the father's death if there are sons of the wedded wife, then those brothers should make the son of the female slave a 'half sharer.' The meaning is that they should give half out of their own shares." If the learned judges had a desire to see whether there was any doubt in the actual text of the Mitakshara they would have found no difficulty whatever. As it is, it is fortunate that they have arrived at the correct conclusion by following other writers the translation of whose works gave rise to no such doubt,

Thiyagaraja Pillai *v.* **Ratnasabapathi Pillai.**—I.L.R. 34 M. 284:—This case raises an important question of limitation. The learned judges hold that in the case of joint trustees of a temple, if one of them is barred the other also, a minor at the time of the cause of action, will be barred. The question in the case was as to the right of management. It has been held by the Privy Council that the person asserting a claim to management, whether joint or several, is asserting a personal right to which the provisions of S. 10 will have no application. A person who claims to be a joint trustee asserts, therefore, a personal right, and unless it is said that the other joint trustee represents him even in respect of such a personal right, it cannot be held that the bar against one of the joint trustees will operate as a bar as against the other. It has also been held that, although according to the rules of foundation, the right of management exclusively vests in a single person or family by the operation of the law of prescription, another person may acquire a right of joint management, and so also a joint right of management vested in two persons may become an exclusive right vested in one of them. Under those circumstances it is difficult to see how the supineness of one of the joint trustees will operate as a bar so as to prevent the other trustee who was under a disability at the time from bringing a suit. Nor can it be said that one joint trustee is capable of giving a discharge without the concurrence of the other joint trustee or trustees. So far as this matter is concerned we regret the learned judges have not given any reasons for their conclusion.

Tataya *v.* **Ramakrishnamma.**—I.L.R. 34 M. 288.—We welcome the decision in this case as laying down a cor-

rect principle of Hindu law, and we have no doubt that the Hindu community will be immensely satisfied with it. The extent of the power of alienation by a Hindu widow has been the subject of judicial decision not always uniform. After the decision of the Judicial Committee in the well-known case of *Kavali Venkata Narayanappa* it was thought that the widow had absolutely no power to make any gift of the property inherited by her from her husband. Ever since the decision in I. L. R. 22 M. 113 this proposition cannot be sustained in its broad form. Gifts of land to the son-in law at the time of the daughter's marriage,or even thereafter, in pursuance of a promise made at the time, will be valid provided it is reasonable,having regard to the property inherited by the widow. In this case a gift made by a daughter of some small item of land when she performed her father's *sraddha* on the occasion of the *Pushkaram* has been upheld as valid and binding on the reversioners.

Raj Lakshmi Dasee *v.* Katyayani Dasee.— I. L. R. 38 C. 639:—The decision in this case invites discussion. The question how far want of jurisdiction in a tribunal can be cured by consent or waiver has given rise to a series of decisions which, though not directly in conflict with each other, are not altogether reconcileable. The case of *Ledgard* v. *Bull* (9 Allahabad 191) decided by the Privy Council in 1886 has been interpreted in varying ways by the High Courts. The subject may be dealt with under two heads:—(1) Agreement to accept the jurisdiction of a particular tribunal, and (2) Failure to object to the jurisdiction of a tribunal which adjudicates upon the merits. In both these cases, the contentions may relate merely to the process by which the rights are to be enforced. Courts have been inclined to treat lapses in this direction as curable more than in other cases. The earliest pronouncement of the Privy Council on this subject is to be found in 2 Indian Appeals, 219. The principle of that decision is that the party who agrees to be bound by the decision of a court in a particular way is estopped from contending that the court had no power to deal with the subject-matter in the way it has done. This was a case of agreement, and the decision in this case has been followed in 5 Calcutta 27 and 20 Calcutta 22. Will this principle of

estoppel apply where there is no agreement? The dictum of *Sir S. Subrahmanya Aiyar* in 28 Madras 337 leads to the conclusion that in cases where a court is seized of jurisdiction, the fact that it is not in a suit but in an execution proceeding that the rights are determined, will be no ground for questioning the decision. In the present Code of Civil Procedure there is an express provision (see S. 47, Cl. 2) that suits can be converted into execution applications and *vice versa*. This indicates that in the view of the legislature, these formal defects should not stand in the way of substantial justice being rendered. However it should not be forgotten that the mode of dealing with a case in the execution department differs materially from its disposal as a regular suit. The same strict principles of *res-judicata* do not apply, although to a limited extent they are held applicable; and other material differences may be pointed out. It is, therefore, doubtful whether mere failure to object to jurisdiction will operate to estop the silent party from pleading want of jurisdiction.On the other hand there can be no question that where parties agree that the process of enforcement of rights shall be by application, the disputing party will ordinarily be estopped from receding from his agreement. There is, however, one consideration that should not be overlooked. Suppose that the submission to jurisdiction is against an express provision of law. Will there be an estoppel? The decision in 10 *MadrasLawTimes* 385 sounds that the bar by agreement will not extend to the violation of the declared will of the legislature. If this is the correct view, when the legislature says that certain matters shall be decided only in execution and not by a separate suit and *vice versa*, is it open to the parties by agreement to circumvent such provisions? The principle of *Ledgard* v. *Bull* is that the parties cannot confer jurisdiction where none exists. It is not the privilege of the parties, but it is the prerogative of the sovereign power to say how and by whom a certain disputed claim shall be adjudicated. For these reasons, it is open to doubt how far agreement of parties can give jurisdiction to a court where there is express provision by the legislature in that behalf. The true solution will lie in holding that where the law has not prohibited a mode of adjudication, parties can agree that the adjudication shall be by a particular process.

This leaves out cases where the court has no inherent jurisdiction to decide. The most important class of cases relates to the pecuniary limits of a court's jurisdiction. It is in this connection that the decision of the Calcutta High Court in the case under notice becomes important. In this case a suit was brought in the Subordinate Judge's Court which was valued at Rs. 2,100 whereas the same property in a previous litigation was valued at Rs. 10,500. An appeal was taken from the decree of the Subordinate Judge to the District Judge where the parties entered into a compromise. In a subsequent suit, a reversioner, not a party to the litigation, sued to set aside the compromise. One of the grounds relied upon was that the suit which resulted in the compromise was undervalued and, as a consequence of it, the District Judge heard the appeal from the Subordinate Judge whereas, if there had been a proper valuation, the appeal would have lain to the High Court; consequently, the compromise was not binding on the reversioner. The learned Judges of the Calcutta High Court upheld this contention. The learned Judges point out that decrees passed without jurisdiction are nullities. This introduces an exception to the rule that agreement to submit to jurisdiction or waiver of it will be binding on the parties. The learned Judges are apparently of the opinion that the exception will apply only in cases where there has been an inherent want of jurisdiction. If that interpretation is correct, it is difficult to see why a distinction should be made between third parties and parties to the litigation (see page 668). We do not know whether the court had in mind the principles of estoppel enunciated in 2 Indian Appeals, 219. In that case not only the parties, but the privies also were held bound by the estoppel. We are inclined to think that the question should be more fully considered. The proper course is probably for the legislature to intervene. One simple rule may be enacted that in all cases where parties proceed to trial without impeaching the jurisdiction of the tribunal in which the matter is litigated, neither the parties to the suit nor their privies shall be allowed to object to the validity of the decree, unless they are in a position to show that jurisdiction was invoked owing to the fraud or misrepresentation of either of the parties to the suit. This is the view that seems to have prevailed in the case reported in I. L. R. 35 B. at page 24.

SUMMARY OF ENGLISH CASES.

Johnson *v.* O' Neill. [1911] A.C. 552 (Ir.)

Fishery—Inland non-tidal navigable lake in Ireland—Crown grants—Long and open user by public—Legal origin.

In this case in which the plaintiff claimed exclusive right to eel fishery in an inland lake in Ireland which was non-tidal but navigable, and an injuction to restrain the defendant, one of the neighbouring fishermen who were for the last three centuries openly fishing in the lake, Earl *Halsbury* and Lords *Ashbowurn*, *Maenaghten* and *Duneden* (Lords *Loreburn*, *Robson* and *Shaw* dissenting) held that the plaintiff had proved his title from the Crown from the year 1605 and his exclusive possession from that time, and granted the reliefs prayed for.

Per *Curiam.*—"The Crown is not of comm on right entitled to the soil or waters of an inland non-tidal lake."

Per Lords *Halsbury*, *Macnaghten*, *Dunedin* and *Robson.*—"No right can exist in the public to fish in the waters ofan inland non-tidal lake. There can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. *In this country* one and the same law applies to inland non-tidal waters, whatever the size of the water space may be."

Per Lord *Robson.*—" You can assume a legal origin for the long and open user of the public."

Harris *v.* Chesterfield. [1911] A. C. 623 (E).

Fishery—Claim of exclusive right—Non-navigable river—Freeholders' open user for centuries—Presumption of legal origin.

In this case in which also a similar exclusive right of fishing was claimed by two proprietors on the banks of a non-tidal river in England against the freeholders of five parishes adjoining the river, though all the Lords of the House found the title of the plaintiff to right of fishing, four of them held it to be an exclusive right while three others held it to be subject to the right of the freeholders of the five parishes on the ground that long, open and continued user for six centuries created a presumption of legal origin (such as, a grant to the plaintiff's ancestors by

the Crown from whom the plaintiff claimed, subject to the rights of the defendents.)

Per *Curiam*.—A prescription in que-estate for a profit *à prendre in aliene solo*, without limit, without stint, not with reference to the wants of the estate but commercially for the purposes of *sale*, is unknown to the law.

New Monckton Collieries Ltd. *v.* Keeling.
[1911] A. C. 648 (E).

Workmen's Compensation Act—'Dependent,' meaning of.

" A wife who had not been supported for twenty years and who in no sense relied upon the workman for any help" cannot be said to be a dependent upon him so as to claim compensation in case of an accident to the workman within the meaning of the Workmen's Compensation Act, 1906.

The question whether a person is dependent upon a workman is a question of fact.

William Edge & Sons, Ltd. *v.* William Nicolls & Sons, Ld. [1911] A. C. 693 (3).

Passing off—Abortive patent.—Deception of purchaser—Injunction.

Though a person may have his patent for his goods revoked by the authorities, yet if his goods have acquired a fame by their excellence, no other person has a right to manufacture and sell goods closely imitating the same in a manner calculated to deceive the purchasers into the belief that they are purchasing the goods of the former.

It is a question of fact whether the resemblance is substantially similar so as to deceive the purchasers.

It is not necessary that the purchasers should know the name of the plaintiff; it is sufficient if, when they buy, they think that they are buying the goods of the renowned manufacturer, viz., the plaintiff.

In the above case plaintiff's goods had a distinct appearance, but his name was not put on them. Defendant closely imitated his goods but put on his own name.

Injunction prayed for was granted. Revocation of the patent cannot enlarge the rights of the defendant.

Per *Lord Robson*.—The result will be the same if the goods were not patented at all, but had aqcuired only a reputation.

Haddington Island Quarry Coy., Ltd *v.* Huson.
[1911] A. C. 722 (P. C.)

Mortgagee with power of sale—Sale prejudicial to mortgagor—Purchaser no party to fraud—Sale not to be set aside—Inadequacy of price not specifically pleaded.

A mortgagee with a power of sale sold the properties in virtue of the power. The mortgagor brought this suit against the mortgagee and the vendee alleging that the sale was made in fraud of his rights and so as to prejudice him.

Held (1) that the sale could not be set aside inasmuch as there was no allegation that the purchaser was a party to a fraud practised by the mortgagee and that the fact that the purchaser did not adduce any evidence as to the adequacy of the price paid by him ought not to prejudice him as there was nothing to show in the pleadings that the inadequacy of the price would be relied upon at the trial as vitiating the sale.

Stirling *v.* Burdett. [1911] 2 Ch. 418.

Co-sureties—Contribution—Only after payment of his proportion of the entire debt, though not accrued due.

A surety is not entitled to contribution from his co-sureties so long as he has not contributed more than his proportion of the entire debt. The fact that he has paid more than his share of the portion of the debt that has accrued due does not entitle him to claim contribution.

***In re* Sly, Spink & Co.** [1911] 2 Ch. 430.

Company—Articles of Association—Appointment of only 3 *directors, while* 4 *required by—Effect of.*

When the articles of association provide that the number of directors shall not be less than four, the board is not properly constituted if it consists of only three members, though

three members form the quorum, and even though, when once the board is properly constituted and a vacancy occurs, the remaining members not being less than three are given power to act, allotments made by a board so constituted are invalid.

In re **Graham-Wigan.** [1911] 2 Ch 438.

Costs—Principle—Compulsory redemption of extraordinary tithe-charge.

On principle, where powers are given to a person to take a property from another compulsorily the costs of any proceeding necessary for the exercise of such compulsory power must fall on the person seeking to exercise the power. In this case the proceeding was one instituted to compulsorily redeen a *tithe*-charge.

Manks *v.* Whiteley. [1911] 2 Ch. 448.

Subrogation—Applicationof 'Toulmin v. *Steere'—Marshalling.*

The relevant facts in this case were as follow: First there was a mortgage in favour of *A*; then a collateral security in favour of *B*; then a further charge in favour of *A*; finally an arangement in 1905 with *B*. At this stage the mortgagor agreed to sell the property to *C* who obtained the money to pay off *A's* mortgage from *D*, advancing the rest herself. The transaction was carried out (i) by a reconveyance by *A* to the mortgagor free of his mortgage and further charge; (ii) a conveyance by the mortgagor to *C*; (iii) and then a mortgage by *C* to *D*. Neither *C* nor *D* had any notice of *B's* charge; that fact was fraudulently suppressed by the mortgagor. On these facts, it was argued that *Toulmin* v. *Steere* applied and *B* had a first charge on the property. But *Parker* J. *held* that it was not so. So far as *D* was concerned, on the ground that as soon as, at the request of *C*, he paid off *A's* mortgage, he became entitled in equity to the benefit of the mortgage in his favour and *Toulmin* v. *Steere* did not apply to such mortgagee taking a further security. So far as the further charge was concerned, his Lordship repelled the plaintiff's claim on two grounds: *Toulmin* v. *Steere* would apply only if there was notice, actual or constructive, at the date of the conveyance

in favour of *C*. Even if that case applied, it was hardly consistent with equitable principles to allow a third party to claim in a Court of Equity an advantage never intended for him, for which he has given no consideration, and his only title to which rests on a transaction voidable between the parties to it on the ground of fraud or misrepresentation.

There was also an argument based on marshalling in this case. In respect of his collateral security, *B* had another property also as security for him. At the instance of the mortgagor he had released his claim over that property. It was argued that this transaction was in derogation of the rights of *C* and *D* to compel the plaintiff to marshal his securities in their favour and therefore disentitled him to enforce his collateral security. His Lordship held, no. The equitable right of marshalling had never been held to prevent a prior mortgagee from realising his securities in such manner and order as he thought fit.

The result was, his Lordship declared the priorities thus: First *D*, then *B* in respect of his collateral security, then *C* in respect of *A's* further charge, then *B* in respect of his arrangement.

Edmondson *v.* Copland. [1911] 2 Ch. 301.

Mortgage—Notice—6 months' notice or interest—Tender, kept good—Essentials of.

The rule of English law that the mortgagee is entitled to six months' notice or interest for that period, does not apply once there has been a demand by the mortgagee for money, even though the period fixed by his notice for payment has expired.

In order to avoid payment of interest after tender improperly refused, the mortgagor must either pay the money into court, if there be any proceedings by which that could be done, or keep the money ready and either make no profit or, if he make profit, *e. g.*, if he get interest by placing the money on deposit, he must account for such profit to the morgtagee. Possibly paying it into the mortgagor's current account at the bank, if the balance to credit always exceeded the mortgage money, would do. In this case, the mortgagor had borrowed the money for a few hours from his bankers and made the tender. They charged no interest for the loan. The mortgagor's contention was that afterwards, without

actually borrowing the money from his bankers, he left securities with them upon which he might have borrowed the money at any moment and that he also left it with them expressly for that purpose. *Joyce* J. *held* that this was not sufficient to relieve the mortgagor from the payment of interest.

Wilson v. Amalgamated Society of Engineers.
[1911] 2 Ch. 324.

Osborne Case—Application to securing representation on Municipal and other local bodies—Compulsory levy, though ostensily voluntary.

The rule laid down by the House of Lords in the *Osborne Case* with respect to the power of trade unions to levy contributions for securing parliamentary representation applies equally securing representation on Municipal Councils and other local to bodies (not being boards of guardians). The *Osborne Case* struck at compulsory levy of contributions for the purpose of securing parliamentary representation, when contributions, though declared voluntary by the rules, were, as a matter of fact charged against individual members if they did not dissent from such levy in a particular form which precluded collective action on their part. The levy was held to be really compulsory and to come within the mischief of the decision.

Copestake v. West Sussex County Council.
[1911] 2 Ch. 331.

Public way—Dedication—Presumption of dedication—Land between metal and fence.

When the lord of a manor encloses a strip of land by the side of a public highway and within a few feet only from the metalled portion of the road hard by whatever the presumption before, a presumption thereafter arises that what he leaves between the metal and his fence is dedicated to the public.

In re **Hammond Burniston v. White.** [1911] 2 Ch. 342.

Will—Construction—Gift to widow—Bigamous marriage.

A gift by will to *A* "during her widow hood" and "until her second marriage" by a person with whom she had gone through

the ceremony of marriage after acquainting him with all the facts under the mistaken belief that her husband was dead at the time (not having been heard of for over 7 years and also reported to have been drowned) is not a gift conditional upon the marriage being valid, and the trustees of the devise are not entitled to discontinue the allowance in her favour under the will when the husband turns up.

Smith *v.* Martin and the Corporation of Kingston-upon-Hull: [1911] 2 K. B. 775 (C. A.)

Negligence—Local education authority—Provided school—Negligence of teacher—Injury to student—Relation of master and servant—Liability of authority.

The defendant corporation who were the local education authority for the district had the control and management of a public elementary school provided by them. The teachers in the school were appointed, paid and were liable to be dismissed by the defendant corporation. The plaintiff, a girl of fourteen, attended the school and one of the teachers asked her during school hours to poke the fire and draw out the damper of a stone in the teachers' common room. In doing so plaintiff's dress caught fire and she was seriously injured. The jury found that the act of the teacher was negligent. The Judge held that there was evidence to support the finding but directed judgment for the defendant corporation. On appeal—*Held*: that the relation of master and servant existed between the corporation and the teachers; (2) that the act of the teacher was within the scope of the employment which was not confined to teaching alone, and (3) that the corporation was liable to the plaintiff for the negligent act of the teacher.

Chaplin *v.* Hicks. [1911] 2 K. B. 786 (C.A.)

Damages, measure of—Contract, breach of—Remoteness.

Where by a contract a person has a right to belong to a limited class of competitors he is possessed of something of value and where by reason of defendant's breach of that contract that person loses all the advantages of being in the limited competition he is entitled to substantial damages.

The mere fact that contingencies on which the result depends are numerous does not render the damages for the breach of a contract unassessable.

Chuter v. Freeth and Polock, Ltd.
[1911] 2 K. B. 832.

Corporation—Sale by 'person'—False warranty—Reason to believe.

S. 20, Sub-S. 6 of the Sale of Food and Drugs Act 1899, provides that every person who in respect of an article of food or drug sold by him as principal or agent gives to the purchaser a false warranty in writing shall be liable on summary conviction to a fine, etc., unless he proves that when the gave the warranty he had *reason to believe* that the statements or descriptions contained therein were true. *Held* that a joint stock corporation can be convicted of an offence under the Act. A corporation, though a juristic person, can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true.

Cope v. Sharpe. [1911] 2 K. B. 837.

Tresspass—Justification—Act done to preserve master's property—Entinguishing fire—Necessity—Reasonableness.

Plaintiff let the shooting rights over his land to another for some years. A number of fires broke out on the land. Defendant the bailiff and head game keeper of the lessee came along and set fire to some strips or patches of heather at some considerable distance from the main fire when plaintiff's men were engaged in extinguishing the fire. *Held* in an action for damages and injunction that the tenant of the shooting rights, if fire breaks out on the land, is entitled to take such steps to extinguish the fire as may be necessary in the circumstances for the preservation of the game. But the intervention of the tenant for the preservation of the game must be actually necessary to justify trespass.

Attorney-General v. Reynolds. [1911] 2 K. B. 888.

Rights of common estovers appurtenant—Ancient house—Destruction—New house on old foundation.

If an ancient house falls down or is destroyed, any rights of common estovers appurtenant to the house are not lost. If another house is built in continuance of the old house and if in the circumstances of the case no additional burden or injustice upon the lands over which the right is enjoyed is inflicted, the rights may be enjoyed as appurtenant is the new house. The house in order to be a continuance of the ancient house need not be built on the same foundation.

Hamp-Adam *v.* Hall. [1911] 2 K. B. 942 (C.A.)

Practice—Writ of summons—Date of service—Indorsement within three days—Non-compliance with O. 9, R. 15.

O. 9, R. 15, requires that within three days after service of writ the person serving it shall indorse on it the day of the month and week of the service. Otherwise the plaintiff shall not be at liberty in case of non-appearance to proceed by default. In this case plaintiff issued a writ against defendant claiming damages for assault. The writ was served and the indorsement was not made until long after the prescribed time. Plaintiff subsequently signed judgment in default of appearance of defendant and a verdict for damages was given.

Held that non-compliance with O. 9, R. 15, was not an irregularity which could be waived and the rule not having been complied with, plaintiff was not entitled to succeed and the judgment was set aside.

JOTTINGS AND CUTTINGS.

A blue bull in court.—An Indian judge, when first appointed to his position, says the *Bombay Gazette*, was not well acquainted with Hindustani. He was trying a case in which a Hindoo was charged with stealing a "nilghai." The judge did not like to betray his ignorance of what a nilghai was, so he said, "produce the stolen property." The court was held in an upper room, so the usher gasped, "Please your Lordship, it's downstairs." "Then bring it up instantly!" sternly ordered the judge. The official departed, and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open, and the panting official appeared dragging in a blue bull. The judge was dumbfounded, but only for an instant. "Ah! that will do" said he. "It

is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher."

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"*Success.*"—The following letter we find addressed to the Editior of the Law Student's Journal—Sir,—As a constant reader of your journal may I be allowed to remark upon the above article in your October issue? To sum up the article, the rule appears to be that a person's success depends upon his personal endeavours and grim determination. With all respect to the writer of the article, I fail to agree with such rule. No mention is made of the workings of fate in the success of a person, which, I submit, are a great thing to contend with, inasmuch as it is to this fact that many owe their success and others owe their failures. As an instance I might mention my own personal experience in the matter. Since It left school I have been endeavouring to qualify myself for a good position, or, in other words, to be a success. I have studied law, especially Real Property, for some time, and have (through grim determination and personal endeavour) secured a first class certificate at the Birkbeck College. But this is of no use to me, as, whenever I apply for a better position than the one which I now hold (viz., short-hand typist), I am asked whether I have any *practical* knowledge of conveyancing, which I take to mean examination of abstracts, drafting of documents, &c. To this I have to answer in the negative, as by the working of fate, this is denied me. No doubt your journal is not intended for such as myself, although I always find it very educating. If the article was meant for those who have influence behind them, then I can agree with the rule there laid down. But if the article was meant for "rich and poor alike," the rule is, in my opinion, far too wide.—Yours, &c. P.S.H.

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Mr. Frederic Harrison.—We take the following from the *Law Notes*:—Mr. Frederic Harrison, in his "Autobiographic Memoirs," just published, says: "I have since lived to be in close touch with some of the most eminent counsel, judges, and magnates of the law. I have known them in Court and learned societies, and in Royal Commissions, and I am free to say that I have hardly known more than some few of them—such as Charles Bowen and Horace Davey—who had clear ideas on general problems of philosophy or politics. Some of the greatest lawyers who ever filled the Woolsack have shown themselves to be bigots in religion, and party hacks in statecraft. Nor can I recall a great lawyer in full practice who had any serious

interest in matters of abstract thought, or any rational sense of spiritual truth."

Severe criticism ! Mr. Frederic Harrison should remember that the busy workers of this work-a-day world have little time to spare for interest in matters of abstract thought ; they are too deeply engaged in the actualities of life. As to possessing a rational sense of spiritual truth, we venture to think that many working lawyers possess that sense but refrain from discussing spiritual truths. Mr. Frederic Harrison should remember that we cannot all be profound philosophers. Most of us have to earn bread and butter for our families.

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Mr. Justice Darling's wit shows signs of distinct deterioration. His Lordship's remark last month to Sir George Douglas, who desired to be excused from serving on a jury, was not up to his old form : "The temptation to remain is that you may earn a guinea. The circumstances of a Scotchman wishing to return to Scotland when he could make money by remaining in England are so exceptional that I will excuse you."—*Law Notes*.

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Dissentient Judgments.—One of the notable changes which the Appellate Jurisdiction Bill, which is now before the House of Commons, will introduce into the practice of the Judicial Committee will be the delivery of dissentient judgments. At present only one decision, which, in form, is a statement of the reasons for the Committee's recommendation to the King, is delivered ; in future all the members of the tribunal will be free to express their conclusions. The Lord Chancellor frankly confessed, when the Appellate Jurisdiction Bill was introduced, that he personally did not view the proposed change very favourably, but that the representatives of the Colonies insisted so strongly upon the judgments of the dissentient members of the Committee being made known that he did not feel justified in placing his own opinions on the point in opposition to theirs. Whether the proposed alteration in the historic practice of the Committee will add to the weight of its authority may, no doubt, be questioned. The Committee will no longer speak with a single voice. A case which has excited a vast amount of feeling in a colony may be decided by a bare majority, and the decision, particularly if the representative of that colony on the Committee should happen to be in the minority, may not be accepted so readily as it would be if the division of opinion were unknown. On the other

hand, the advantages of the delivery of individual judgments cannot be denied. Each member of the Court necessarily feels a deeper sense of responsibility when he has publicly to concur or disagree and a dissentient judgment, though not effective in the immediate case in which it is delivered, may be of real value in subsequent cases akin to it. That the Court of Criminal Appeal should be capable of delivering only one decision is natural enough. It deals with questions of life and liberty on which unanimity is required in the court below. It would obviously hamper the administration of justice if, in the case of a prisoner sentenced to a long term of imprisonment, one of the judges gave his reasons for differing from the decision of the majority of the court dismissing the appeal. No such considerations apply in civil cases, and the Judicial Committee is alone among civil tribunals in the conclusions of its dissentient members being suppressed. The proposed change has, too, the merit of assimilating the practice of the Judicial Committee with that of the House of Lords—a process which must necessarily be completed before the ideal of one great Court of Appeal for the whole Empire is realised.—*The Law Journal.*

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The Trial of Socrates.—It was a happy inspiration of Sir John Macdonell's on the opening of his fresh course of Quain lectures, to illustrate Comparative Legal Procedure by certain *causes celebres*; and of all notable trials there is surely none—with one solitary exception—which has drawn to itself the interest of all civilised mankind more than the trial of Socrates, for in that trial there centered the keenest animosities of religion and politics. To understand the proceeding aright we must picture to ourselves our House of Commons hearing an impeachment for impiety brought against some well-known citizen of to-day; for in Athens every citizen above thirty was thought fit to be a judge, and the number of such judges who made the court to try Socrates was not less than 500. We must picture, too, this popular tribunal—a microcosm of Greek democracy—swept by constant gusts of passion as the rival orators exerted in turn their arts upon it. There was a presiding magistrate, but he had little power. What is, perhaps, least consonant in the scene to English ideas of justice is the vaguenesss of the indictment. It ran as follows, on the deposition of Meletius, one of three prosecutors: 'Socrates does evil. He does not believe in the Gods whom the State believes in, but introduces other new deities. He corrupts the youth. Punishment, death.' What an apple of discord to throw

down in such an assemblage! Each judge had, it is true, taken an oath 'to vote according to the laws, to listen with attention to the accuser and accused, to do what is just,' but who shall say what cross currents were working in the minds of those 500 judges in coming to the decision that they did! In many there would be personal pique remembering how their shallow theories had been exposed in the market place by the exasperating methods of the philosopher; in others, lingering vestiges of venerated superstitions—the faith of their fathers; in others, again, dread of innovations in an age verging rapidly to decadence. Not least there was the unbending attitude of Socrates himself—sustained by that strange inward monitor whose voice he heard—refusing in his Apologia to stoop for mercy, and sitting in judgment on his own judges. And so the verdict of guilty passed by 281 votes to 219. Right or wrong from the Greek standpoint of that time, Socrates must always to us moderns stand out an heroic figure—the first of the martyrs for truth. He did more for mankind by dying than he would by living; for as Byron finely says, apostrophising Liberty in his 'Castle of Chillon':

'For when thy sons to fetters are consigned,
To tters and the damp vault's cheerless gloom,
Thy spirit conquers with their martyrdom
And Freedom's fame finds wings on every wind.'

—*The Law Journal.*

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The Custody of Children. In the matter of H. and H (Infants).—This case, which came before Mr. Justice Warrington last month, was an application by petition in the County Court by the mother of two children, of two and three years of age respectively, for their custody. On the application of the husband it was removed into the High Court, and a cross-summons taken out for the custody of both. At the hearing, and for six months previously, each parent had the custody of one child, and they had not lived together, or met, since March. For the husband it was alleged that at the time of the separation, and for some months before, the wife suffered from acute neurasthenia, and was not well enough either to perform her home duties or to look afte: the children. His case was that she had left him voluntarily, and without excuse, and he objected to his children being brought up l members of her family, who were willing to give her a home. The wife's case was that her illness was due to unhappiness at home, that she had recovered her health since the separation, that her

husband was a busy man and constantly absent from home, and that it was undesirable that the children should be brought up by a relation of his.

Mr. Justice Warrington, in giving judgment, said that upon the evidence the wife's story as to the actual separation appeared to him to be more likely to be the true one, but the conduct of the parents was of no consequence; he had full judicial discretion. which he had to exercise in accordance with the terms of Section 5 of the Guardianship of Infants Act, 1886. It was important that the children should have the care that only a mother could give them, and there was nothing to displace that consideration. The mother's health was, to a great extent, restored, and there was no reason why she should be deprived of her children, and be placed in a situation which might bring about a recurrence of her ill-health. After commenting upon the evidence given by relatives of the parties he refused to continue the existing state of things, and decided that the children must be brought up together at this early age in the custody of the mother. He said: ' It is of the utmost importance that they must not forget their father, or increase the tension between their parents; the father ought to have the fullest access to his children, that is, the right to take them away and enjoy their company in any place that he thinks fit, and when he has a holiday he ought to have their custody.' An order was accordingly made that the mother should have the custody of both children for three years, or until further order, except that the father should have the custody during his annual holiday, and when one parent has the custody the other should have all reasonable access.—*The Law Journal.*

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The Late Lord James of Hereford.—Viscount Morley of Blackburn, in paying a tribute to the memory of the late Lord James of Hereford, said :—He had a great career in what I make bold to call the most powerful of professions. When he entered the House of Commons he achieved there also a speedy and a marked success. He hed been trained, and highly trained, in the art of honourable advocacy, and I am sure that proficiency in the art of advocacy—there are at this moment many examples to confirm the view—is not in the least incompatible with Parliamentary gifts. Let me recall with what skill and good temper Lord James conducted through the House of Commons an extremely difficult and complex Bill—the memorable Bill against corrupt electoral practices. In this House it did not fall to him to pilot any measure of those dimensions, but

whenever he addressed the House it always struck me that headdressed it in a tone of deliberation. Although it may seem strange to say it, it has always struck me that the tone of deliberation is not the commonest of things in deliberative Assemblies—not always in Parliament, not always in administrative and executive bodies, and, perhaps, not always even in Cabinets. Lord James had that tone of deliberation. He appeared to be trying to impress the House with the very arguments which had convinced him in the formation of his own judgment. I pass to another point. In political life, with all its tremendous difficulties and tremendous temptations, it does not matter much more what opinions a man holds than with what strength and straightforwardness he holds them. Lord James was a model of clear opinions firmly held. If is unfortunately too well known to many of us that in our generation there have been three great divisions of opinion and of action among parlimentary leaders, and three great divisions in the political life of the country. Friends have been severed and party cohesion has been broken. On all these severe and testing occasions neither of the two great parties has been wanting in fine and conspicuous examples of personal disinterestedness and personal self-sacrifice. Of these manifold cases I know none more admirable than the case of Lord James. He had within his hand the highest prizes, whether of his professional or his political career, and all the natural impulses of a perfectly legitimate ambition in Lord James gave way to his sense—right or wrong—of public responsibility. He was one of those—and I knew him well—who thought none of these prizes, important as they are, more enviable than the prize of the attachment of his colleagues and the general esteem of his countrymen. So much for his public traits. I think I should be wrong to leave out this, that he was always on the look-out keenly to help younger men at the Bar, men with no high connection and with small prospects—he was always keen to hold out to them such a helping hand as a great and tried lawyer can hold out to a junior. But beyond this generous readiness of professional help his sympathies were very wide and ever generous; indeed, I might say from knowledge that he was not only generous but sometimes what may be called lavish. He was very careful always not to let his left hand know all his right hand was doing. Of him, who might have been Lord Chancellor, it was not too much to say he lived in the spirit of a famous saying of the greatest of our Lord Chancellors, Lord Bacon :—" The nobler a soul is, the more objects of compassion it has.''—We are living, as we know to our cost, in an age and in an hour of deep commotion in respect to the institutions of our country;

but, after all, when we look at the foundations of things, what matters more than anything else is that our leading men, whether they be Lords of Parliament or men in homelier stations, who work these institutions should be men of sterling character.

The Marquess of Lansdowne said:—Lord James of Hereford fought his way to foremost rank without any adventitious aid, he fought his way to a foremost place in his profession, and to a not less prominent place in our political life. The noble Viscount has spoken of his high position at the Bar, and I will add nothing to what he said on that point, except with regard to one fact to which he referred—that at a particular moment Lord James had within his grasp the greatest prize to which a lawyer can aspire, almost the greatest prize to which any subject may aspire, and that he forewent that prize because at that particular moment his interests pointed one way and his convictions in an opposite direction. That one fact appears to me to establish all that we desire to establish with regard to Lord James's high character and reputation. In the House of Commons he was always a conspicuous figure. He delivered speaches there still remembered by those who had the advantage of hearing them. In connection with his political career I cannot resist, as one who feels a very deep reverence for the memory of the late Duke of Devonshire, referring to the fact that throughout his long political career a man so strong, so full of sterling qualities, and so keen a judge of men as the late Duke of Devonshire should have always regarded Lord James as one of his most intimate friends and counsellors. In this House we always listened to him as to one speaking with an authority which few members had. To sum up, I may say that Lord James's career represented a long life during which, I suppose, he contributed more than half a century of uninterrupted public service of the most useful and meritorious description.

The Earl of Halsbury said that both in political life and in the Courts of Law Lord James of Hereford and he had been opponents more often than they had been together. He could say truthfully of Lord James that, whether in political or forensic life, he had never, never met a more honourable and straightforward opponent. Although he had not been always of the same politics as Lord James that fact never at any time interfered with their friendship; indeed, when Lord Jamse seat in Parliament was assailed by petition he had the honour of assisting Lord James to retain it. He concurred with what had been said with reference to Lord James's conduct of the Factories Act, a most useful measure, which was brought to a

successful issue by the skill with which he conducted it. Their Lordships knew how well the public career of Lord James deserved the encomiums which had been passed upon it, but there was a side of his character with which none but his intimate friends became familiar. A more generous and kind-hearted man never lived. No case in which the suffering and the poor were engaged failed to obtain his assistance when it was sought. It was right that this should be said of Lord James's private character, as it was known by those among whom he lived and by whom he was most mourned.—*The Law Journal.*

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Poor Man's Lawyer association.—Steps are being taken in Cardiff to establish a Poor Man's Lawyer Association, similar to those established in London, Birmingham, and elsewhere. In the course of conversation with a *South Wales Echo* representative, Mr. F. G. L. Davis, who is taking a prominent part in the work, said: 'You have no idea of the number of poor people in Cardiff who are harrassed and who suffer injustice because they cannot afford to consult a lawyer, and it is to meet such cases that we propose forming a society to protect them. I believe professional men will give their time, their knowledge, and their sympathy to the poorest of the poor, to help them in their troubles.'—*Ibid.*

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The New Home Secretary.—One welcome result of the changes in the Cabinet is that we again have a Home Secretary who is a lawyer Mr. McKenna, who, ceasing to be First Lord of the Admiralty, has succeeded Mr. Churchill at the Home Office, was called to the Inner Temple 1887, and was a practising member of the Common Law Bar until he entered the House of Commons in 1895. In view of his intimate connection with the administration of the law—his exercise of the Royal prerogative of mercy, and the large amount of legal patronage at his disposal—there are obvious advantages in the Home Secretary being an experienced lawyer. Mr. McKenna, though he has ceased for several years to be an active member of the profession, may be relied upon to avoid the mistakes which, both in regard to his attitude towards the judges and the character of his appointments, have marred Mr. Churchill's career at the Home Office. In recent years the office has been held more often by a lawyer than a layman. It has had eleven occupants since the formation of Mr. Gladstone's Ministry in 1880, and six of them have been members of the Bar. The legal occupants of the office, in addition to Mr. McKenna, have been Sir William Harcourt, Sir Richard Cross, Mr. Henry Matthews,

Mr. Asquith, and Mr. Akers-Douglas, while the laymen who have occupied it have been Mr. Childers, Sir Matthew White-Ridley, Mr. Ritchie, Mr. Herbert Gladstone, and Mr. Churchill. It is remarkable that in a Cabinet containing so many lawyers as that presided over by Mr. Asquith, an office requiring in an eminent degree the qualifications of a lawyer should hitherto have been held by laymen.—*Ibid.*

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'*Counsellors of State*' :—The departure of the King for India, which marks a striving stage in the development of the relations of the Crown to the Dominions beyond the Seas, is of special interest to the lawyer by reason of the form of the Warrant by which his Majesty has appointed Prince Arthur of Connaught, the Archbishop of Canterbury, Lord Loreburn, and Lord Morley to act in his absence as 'Counsellors of State.' Though, as Hallam and other writers have pointed out, the Sovereign does not possess any constitutional prerogative of appointing a Regent, his right to appoint by Royal Authority only 'guardians of the realm,' or Lord Justices, as the *custodes regni* used to be called, during his temporary absence from the Kingdom has never been questioned. During the absence from the realm of the Norman and early Angevin Kings the government of the Kingdom devolved officially on the Chief Justiciar, as the chief servant of the Crown. It was in the reign of Henry III. that the practice of appointing *custodes regni* began. 'They were usually nominated by the King without consent of Parliament,' writes Hallam, 'and their office carried with it the right of exercising all the prerogatives of the Crown. It was, of course, determined by the King's return; and a distinct statute was necessary in the reign of Henry V. to provide that a Parliament called by the guardian of the realm during the King's absence should not be dissolved by that event.' In later times the number of 'guardians' was sometimes unnecessarily large. In 1719, for instance, during the absence of George I. in Hanover, the royal authority was, on the advice of the Privy Council, delegated to a committee of fourteen " guardians and justice of the Kingdom.' The form of the present Warrant is notable not only because the phrase 'Counsellors of State' takes the place of 'Guardians of the Realm' or 'Lords Justice,' but also because it does not confer upon the four 'Counsellors' the right of exercising all the prerogatives of the Crown. They are prohibited from dissolving Parliament or granting peerages or dignities except upon instructions transmitted to them by the King, and they are to refrain from acting in any matter or thing on which it is

signified by the King, or appears to them, that His Majesty's special approval should be previously obtained. 'For the purpose of these Presents,' runs the Royal Warrant, 'any instructions transmitted by Us by telegram, or other such means of communication, shall have the same effect as if they were given by Us in writing under Our Sign Manual.' What this comes to is that the King, though absent from the Kingdom, will be within reach of communication. Thus does modern science affect the ancient forms of constitutional government.—*Ibid.*

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The Judges and the Lord Mayor.

Mr. Justice *Grantham,* in addressing the Lord Mayor in the Lord Chief Justice's Court on November 9, said he had thought of making some suggestions as to the jury system ; but that would not now be fitting, as there was a prospect of the Government taking the matter up. Still, there were certain anomalies that he might refer to. By an Act of George IV., special juries must be drawn from merchants, bankers, and those legally entitled to be addressed as 'Esquire'—one of the most limited of spheres. It was contended that only the importer or exporter was a 'merchant'; that if any others were admitted even rag merchants and marine store dealers might come in. The result was that the number of men available was very limited, and in 1870 householders rated at 100*l.* a year were added. In large areas of Greater London, under the City Sheriff's jurisdiction, very few householders paid so much. and they were of a class who were not desired. Now the number of special jurymen had been reduced by 25 per cent. by the fall in rents ; and the Sheriff was practically breaking the law. In the City there was no difficulty, rents being so much higher. It was asked why juries should not be paid, particularly as Members of Parliament were—men who had been tumbling over their heads and spending their own money freely to get in. By the Act of 1870 juries were to be paid ; but it caused so much ill-feeling and so many difficulties that within a year that part of the Act was abrogated.—*Ibid.*

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The English Bench and Bar.—The Master of the Rolls, replying to the toast of 'The Bench and Bar of England,' at the Guildhall banquet, said the Judges were inheritors of great traditions which helped them. They were the successors of many generations of distinguished Judges who had secured the liberties and defended the rights of the citizens of this country

They could not and did not claim to be equal in learning and in eloquence to some of the great Judges of the past, but they did proudly assert that they would not allow it to be said they were inferior to them in integrity, in independence, and in impartiality. The business of the courts was now in a satisfactory condition—satisfactory so far as arrears were concerned. Some two or three years ago the arrears were in a condition of which they were all rather ashamed ; but thanks mainly to the addition of two Judges to the Bench he was happy now to say that the doors were open and there was no block of any kind. There had been a tendency in recent years to remove from the courts matters which properly belonged to them and entrust them to Government Departments. He ventured to think that was a great mistake. What is the meaning or the value of a decision arrived at in a secret conclave, without argument, without discussion, without reasons assigned, in a Government office? How could that compare with a decision given in open court, after arguments with reasons assigned, and under the criticism and under the searchlight of the great profession so ably represented by his learned friend the Solicitor-General? He thought he knew which of those two proceedings was likely to be most favoured in the City of London. He deprecated the encroachment of the Executive upon the Judiciary.

The Solicitor-General, in responding to the toast on behalf of the Bar, said that the inclusion in this toast of the Bar of England was an ancient tradition and expressed, he hoped, a truth. The true significance of this blending of Bench and Bar was this—that it depended upon the fact, of which the English Bar was proud, that in this country, perhaps alone of all the countries of the world, the duty of an advocate, even at the moment when at the heat of advocacy, was still to remember that he himself was taking part in the administration of justice. He knew that this aspect of the matter struck some members of the public with surprise—the surprise that was crudely expressed by the man who, on reading the inscription in a churchyard, 'Here lies an honest man and a lawyer,' asked for an explanation why they buried two people in one grave. That was not the view which the Bar of England took of its serious responsibility. He would not discuss at that time the ancient conundrum of the ethics of advocacy. It was sufficient to say that they founded themselves on two propositions—the one laid down by Dr. Johnson, who said, 'Sir, you shall not tell lies to a Judge,' and the other laid down by Lord Brougham, when he declared that the duty of an advocate discharging his professional functions for his client was to

know no person save his client. It was because those who belonged to the English Bar endeavoured to combine those maxims that they were proud and grateful to be received at that hospitable board.—*Law Journal.*

Attacks on Judges.—Not often, fortunately, is an English judge assaulted whilst in the performance of his judicial duties. Mr. Justice Ridley, who is to be congratulated, not only upon the comparatively slight nature of the injuries he suffered at the hands of the violent prisoner who flung a stool from the dock in the Birmingham Assize Court, but also upon the calmness and good judgment with which he treated the incident, is, indeed the only High Court judge of modern times who has encountered so disturbing an experience. The only other instances of violence to the Bench have occurred in minor courts. Judge Parry, whilst sitting in the Manchester County Court some thirteen years ago, was fired upon by an enraged bailiff whose certificate he had withdrawn; and Mr. Tindal-Atkinson, K.C., whilst sitting as Recorder of Leeds some six years ago, had a large bottle hurled at his head by an occupant of the dock. The famous assault on Vice-Chancellor Malins, by an American named Cosgrave, may be excluded from this list of dangerous attacks, not because the missile was merely an egg, but because it was thrown at the learned Judge as he was leaving the Bench. All the other modern instances of attacks on members of the Bench have occurred whilst the judges were not engaged in the performance of their judicial duties. Sir George Jessel was at the entrance to the Rolls Court when Dodwell made his abortive attempt to shoot him in 1878; Judge Bristowe was fired upon by a disappointed suitor at the Nottingham railway station in 1889; and Mr. Justice Ridley and Mr. Justice Bucknill—it is strange that the former judge should have been assailed twice in one year—had concluded the hearing of the Hull election petition in June last when two or three excited partisans threw some lumps of coal at them. It is worthy of note that though the prisoner who flung the stool across the court at Birmingham was guilty of the grossest kind of contempt of court, Mr. Justice Ridley did not punish him specifically for the offence, though he may, of course, have taken it into account in passing a sentence of five years' penal servitude for the crime of which he was convicted Much harsher in olden times was the treatment of prisoners who were guilty of attacking the judges, as these two extracts from Mr. Oswald's book on Contempt of Court will serve to show:—

At Salisbury Summer Assizes, 1631, before Richardson C. J., a prisoner, after his condemnation for felony, threw a brickbat at the Chief Justice, which *narrowly missed*; for this an indictment was immediately drawn by

him against the prisoner, and his right hand was cut off and fixed to the gibbet, upon which he was immediately hanged in the presence of the Court. (2 Dyer, 188*b*, notes).

One James Williamson, a felon convicted at the Sessions held at Chester in October, 9 Car. 1, threw a stone at the judges on the Bench, for which he was at once indicted, convicted, and had judgment to have his right hand cut off—which judgment was executed accordingly in open Court; and the hand was fixed over the entrance gate of Chester Castle, where it remained some time. [Chester Docket Book (1603-12), 60, 166.]

Perhaps the most surprising thing about the incident at Birmingham is that a loose stool should have been in the dock. The barbarous theory that a prisoner ought to stand throughout his trial is gradually disappearing. If the seating accommodation for prisoners were made permanent in every court, such an incident could never be repeated.—*Law Journal*.

CONTEMPORARY LEGAL LITERATURE.

In the November part of the *Law Magazine and Review* there is an instructive article entitled "The Law of Bankruptcy" in which the writer discusses the principles and foundations on which that law is based so as to avoid a scramble among the creditors and to give protection to honest debtors. He points out certain defects in the present system and, comparing the English Law of Bankruptcy with that as administered in Ireland, suggests as follows:—

Large estates as a rule can be best realised by a trustee under the control of the court. Small estates as a rule can be best realized by an official. Matters of expense in realisation, such as engaging a solicitor, should be curtailed as much as possible. For a speedy and complete realisation of the estate all, persons who had dealings with the bankrupt should be bound to supply all necessary information. Crown debts ought not to be preferred. The admission of debts ought not to be left to the trustee or even to the official receiver. Sittings for proof of debts should be held before an officer of the court possessing a competent knowledge of Bankruptcy Law, whose duty should be not merely to decide on objections to proofs but to see that no debt was admitted that was not proved to his satisfaction. No man's after-acquired property should be captured in cases where he

failed to obtain his dischage merely on account of poverty or of some other cause for which he was not to blame. Court fees ought to be reduced as much as possible. The writer concludes as follows:—The present law does not make a sufficient distinction between our dealings with the bankrupt's property and our dealings with the bankrupt himself; in which latter dealings the public and not the creditors are the interested parties and should bear the necessary expenditure. In consequence of our failure to make this distinction, honest bankrupts, whose assets are small, fail to obtain the full benefit of the bankruptcy laws. As a discharge cannot be procured without money, for the same reason—smallness of assets—many honest debtors are entirely deprived of the benefit of the bankruptcy laws, owing to their inability to pay the requisite fees and these debtors remain liable not merely to seizure of their goods but imprisonment of their persons. It is idle to say these debtors are only imprisoned for dishonesty. It is not dishonesty for an insolvent man having the means of paying a judgment debt to leave it unpaid. On the contrary if he paid it voluntarily it might be held, in the event of a subsequent bankruptcy, to have been a fraudulent preference which might retard or prevent his discharge. And if it is for dishonesty that the debtor is imprisoned, why is he released on being adjudicated bankrupt although his term has not expired and the debt remains unpaid? When the debtor has no tangible assets to be dealt with, all dealings with him should be based on the public interest and not the interest of an individual creditor who is usually trying to obtain an advantage over other creditors equally deserving of consideration.

In the same number there is an article on "King's Peace *v.* Mob Law," the origin and progress of both of which are traced from the earliest times up to date, in which the writer discusses the various causes that lead to disturbances of the peace by the mob who take the law into their hands in order to redress their grievances, sometimes overthrowing monarchies, sometimes causing agrarian riots, and concludes by saying that so long as man's nature does not change for the better and so long as powers that shape the destinies of the masses continue to be selfish in open defiance of the high principles they preach, mob law will be in existence.

There is a very learned article in the September—October part of the *American Law Review* on the "Legal Evolution of Peace" in which the writer compares how the same processes based on necessity, reason, etc., have developed the communal and international peace from a barbarous to a civilized state and concludes by saying that after so much that has been done by the Hague Convention, hopes may be entertained that the conflict between the two agencies on the international side—Public War and Arbitration—will, as in the case of communal peace, result in a victory for the Judicial System and that a submission to the arbitrament of Judicial Agencies will take its place among our permanent social institutions.

The November part of the *Harvard Law Review* begins with a good analytical article on "Powers in Trust and Gifts implied in Default of Appointment" in which the writer discusses the various ways in which such powers arise and how they have been construed with reference to their scope in the various classes of cases in which they have been implied.

The same number of the *Harvard Law Review* contains an elaborate article on the effect of two recent American decisions in "the Standard Oil and Tobacco cases" which the writer sums up thus :—Any undue or unreasonable restraint of interstate trade is illegal. Trade is unduly restrained by agreements which lessen competition among those agreeing to an extent which may reasonably be thought to injure the competing or consuming public. Trade is also restrained unduly by acts, combinations or mere conditions of existence which represent a purpose to increase the trade of those who are parties to the assailed transaction or condition, by interfering with the right to trade of those who are strangers to such transaction or condition ; or, in other words, a purpose to acquire monopoly control. Trade is not unduly restrained by the termination of competition among those who voluntarily combine in the form of a corporate combination of a great number of previously independent corporations —certainly if by means of a holding company, and probably if by means of the purchase of plants outright—creates a *prima facie* case of illegality. Given an undue restraint, the law can reach any possible form of organization or condition of existence in which such restraint is manifested.

A single corporation in no way representing any combination may offend the Act (the Federal Anti-Trust Act). The issue is to be determined in each case by a consideration of all the pertinent facts such as specific acts, general course of conduct and results.

The above article as well as two articles in the above mentioned part of the *American Law Review* and the October part of the *Green Bag* all recognise that a substantial change in the law has been made by the above decisions. The two latter journals also discuss the question how far the judges were justified in making this important piece of judicial legislation affecting the whole of the population of the United States, while the writer in the *Harvard Law Review* finds in these decisions that a great step has been made towards the solution of the "trust" problem, the principle of which decisions, aiming as they do to attack the evils and wrong doings which accompany combination, he hopes, would be embodied in a statute supplementing the Anti-Trust Act as now construed.

Acknowledgments.

We beg to acknowledge receipt of the following publications:—

1. T. V. Sanjiva Row's Reports, Old Decisions, New Series, Vol. II Supreme Courts Reports Bengal; Law Printing House, Mount Road, Madras.

2. " Criminal Law and Procedure by Wilshire 2nd, Edn. (1911): Sweet and Maxwell Ltd., London, Price 8 s.

Allahabad Law Journal for	November 1911.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Kathiawar Law Reports	Do.
Law Notes	Do.
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Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.